

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,119
21,120

ROBERT CALHOUN, JR.
CALVIN FIELDS

Appellants,

v.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court may properly instruct the jury and permit the prosecutor to argue "the missing witness" rule when the evidence does not support the inference that "the missing witness" was available to the defendant charged with failure to produce?

2. Whether the evidence of identification of defendant Calhoun was sufficient, and if so, whether it was sufficiently corroborated?

3. Whether there was sufficient evidence of the commission of sodomy by either defendant, and if so, whether it was sufficiently corroborated?

4. Whether the evidence supports conviction of either defendant for aiding and abetting the other?

5. Whether the learned Trial Judge plainly and without confusion instructed the jury on the issues of (a) identification, (b) corroboration, (c) aiding and abetting, and in general left the jury with a clear understanding of the issues?

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JURISDICTIONAL STATEMENT

This is an appeal from conviction and sentence for rape and sodomy under one indictment in which each defendant was charged with the principal offense of rape and sodomy. Each defendant was also charged in the single indictment with aiding and abetting his co-defendant in the commission of the principal offenses. Hence, each defendant was found guilty of four crimes: two rapes and two sodomies, and sentenced on each. The Court has jurisdiction under 28 U. S. C. 1291.

As will appear from the Statement of Facts set forth below in greater detail, counsel has determined that there is no conflict of interest with respect to the above-named Appellants, since defendant Calhoun testified at the trial that he was not at the scene of the crime and Fields testified to the same thing. The complaining witness testified that both Calhoun and Fields were present. No other persons alleged to have been present testified.

STATEMENT OF FACTS

This Statement of Facts will proceed with those which are common to both defendants and thereafter will be divided into phases of the evidence which apply separately to the appeal of each defendant.

Mrs. Theresa Ward, formerly Theresa Johnson, on May 31, 1966, in the early morning hours at about 2:30 o'clock a.m. found herself at a playground of the Raymond School in Northwest Washington. She was accompanied by two men whom she had met earlier in the evening on 14th Street. She did not know their names except that one she called "Seymour" (TR. 46,47) and another "Michael" (TR.47). The circumstances under which the prosecutrix arrived at the playground are bizarre to say the least, but it is clear that she was there. While she was at the playground with Seymour and Michael, a group of boys, maybe nine or ten, some of whom did not stay (TR. 51) led by a boy called "John" attacked her. John knocked her to the ground, got on top of her (TR. 51) and had relations with her (TR. 52). His trousers were down and they were open (TR. 52). The other boys were "crowded around saying remarks" and Seymour and Michael "were too" (TR. 53). Then when she tried to get away, the boys started pulling her clothes off and removed everything (TR. 54). Prosecutrix testified that they took her over to a picnic table on the playground where both John and Seymour committed oral sodomy (TR. 54). Prosecutrix also charged that Seymour next had sexual relations with her under the picnic table and also committed an act of oral sodomy. (TR. 55). The prosecutrix was screaming but under threats ceased. (TR. 55). Three people did this to her (TR. 56).

Then the boys ran and the police came finding the prosecutrix completely naked. (TR. 56).

Just before the boys came, Seymour appeared to be sitting on the picnic table and acted like he was praying (TR. 50). At the trial, the prosecutrix identified John as defendant Calhoun (TR. 51, 52), and Seymour as defendant Fields (TR. 46, 47).

The prosecutrix testified that John had been wearing a fishnet sweater, a T-shirt, and a pair of khaki pants, which she thought were brown (TR. 59, 60); that defendant Fields was wearing something like a beach shirt and that she did not remember his trousers (TR. 60).

After the police came, they subsequently brought defendant Fields back to the playground at which time the prosecutrix identified him at the scene (TR. 61). She did not remember whether she identified anybody else at the scene (TR. 61), but she did testify that she identified defendant Calhoun either at the playground or at the police station (TR. 62).

Pictures of the prosecutrix were introduced in evidence (TR. 66, 67) which showed a scratch mark on the back of the witness, and a swollen face (TR. 66, 67, 68). Only about two hours elapsed between the time that the prosecutrix met defendant Fields and the occurrence of the incident at the playground (TR. 70). The prosecutrix was nineteen years of age at the time of the incident described above (TR. 71). She was infected with a venereal disease (TR. 81) which was verified when she was examined at D. C. General Hospital (TR. III-10). She admitted having had at least one boyfriend prior to the night in question (TR. 112). At the time of her examination, no evidence indicated that force had been

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used upon her in connection with the act of penetration (TR. III-9). Although the doctor found sperm within her (TR. III-26), he testified that it might have been from a prior contact.

While the prosecutrix was waiting at the playground with Seymour and the person known and identified by her only as "Michael," the boys had suddenly appeared (TR. 100). The boys said nothing to Michael and defendant Fields. There was no sign of recognition between defendant Fields, Michael and the boys in the group. They all acted as if they were apparently complete strangers (TR. 101). At the time, "it was completely dark around the building" and they "were right at the building" (TR. 107). Three of the boys according to the prosecutrix attacked her (TR. 107).

An FBI Agent identified the presence of semen on trousers of both defendants (TR. 118) and semen on shorts of defendant Fields (TR. 119), but no semen on the shorts of defendant Calhoun (TR. 128). Only the trousers of defendant Calhoun had semen; his trunks did not nor did his other clothing (TR. 128). According to the FBI expert "the age of seminal stain cannot be reliably determined." (TR. 132).

Another FBI Agent testified that he had examined the men's clothing and the woman's clothing to determine whether there were any interchange of fibers between the clothing of the men and the clothing of the woman, or any of her hairs and that he found none (TR. 142, 143). The same agent could not testify that the grass stains on the trousers of the men came from the playground, but he did testify that the grass stains could have come from almost anywhere (TR. 144).

A resident of the playground area testified that he heard a female voice calling for help from the playground area (TR. 169), and that the street lights did not "show into the playground . . . not where they was" (TR. 171, 172). It was so dark that the

neighboring resident "couldn't tell how many" people were on the playground but it "seemed to be more than two . . . four or five it seemed like to me" (TR. 174).

A police officer corroborated that the prosecutrix had been found crying on the playground and that "she was nude" . . . "holding part of a skirt in front of her." (TR. 176). The same officer left the playground in his car (TR. 177) to search the area and found defendant Fields nearby "walking west," "breathing heavily," and "His trousers had grass stains on the knees and wet spots in the vicinity of the fly of his trousers" (TR. 178). Upon transportation of defendant Fields back to the scene "he was identified immediately by the complainant" (TR. 179). There appeared to be no street lights near the area in which the incident is alleged to have occurred (TR. 190), and at the time the officer found the prosecutrix "she was very hysterical" (TR. 190). Upon interrogation by the Court, the officer testified again that the complaining witness was "quite hysterical" at the time he found her (TR. 193), but that she had "calmed down" at the time that she identified defendant Fields. Another police officer also testified that when she was found "she seemed hysterical and was crying" (TR. 196).

When another neighboring resident testified about hearing cries from the playground area, he stated that he couldn't see the people because "it was too dark" (TR. 212, 215).

Another officer arrested two juveniles in the area, one of whom the complaining witness identified, and the other one of which she did not (TR. 218). That same officer had seen defendant Calhoun in the area "running south on Georgia Avenue" and stopped him (TR. 220). "He was out of breath and was sweating quite

heavily" (TR. 221), but the officer released him because in the judgment of the officer, he did not give any indication of being a suspect (TR. 222).

Detective Sergeant DeMilt (TR. 228), heard a police call at 2:25 a.m. that a woman was screaming on the playground. He was driving south on 14th Street and Euclid. He immediately made a U turn and proceeded north, turning east on Park Road and then heard an addition to the alarm that there was an alleged rape, apparently committed by five or six Negro males, one dressed entirely in all black. As he got to New Hampshire Avenue and turned north, he "saw a figure trotting at a fair pace on the west side of the street." Next he "commanded him to halt. The subject was sweating profusely. He was all out of breath. He had green grass stains on both knees of his pants." That person was defendant Calhoun (TR. 229). Neither the first officer that stopped Calhoun nor Detective Sergeant DeMilt apparently noticed any wet stains on the front of the Calhoun trousers. Calhoun at that time was wearing gray pants (TR. 230), rather than the brown ones to which the prosecutrix previously testified (TR. 59, 60). The prosecutrix when defendant Calhoun was brought back to the scene "stated that is the ring leader" (TR. 231). Detective Sergeant DeMilt further testified that the prosecutrix had told him that the attacking boys "were apparently hiding in the shadows of the house" (TR. 244), but he also testified that there "was sufficient light to see 100 feet" although he didn't "recall any street lights" (TR. 250), and after some differing opinions about lighting on cross-examination (TR. 253), Detective Sergeant DeMilt candidly stated that he had seen no "wet marks or semen stains" on defendant Calhoun (TR. 258).

On further cross-examination, Detective Sergeant testified that when he examined the playground he used a flashlight (TR. 259).

Each counsel for each defendant made "a motion for insufficient evidence" (TR. III-36).

DEFENDANT CALHOUN

Defendant Calhoun was a caddy and had worn the trousers in which he was arrested while caddying (TR. III-44). On cross-examination, he testified that the stains on his trousers came from grass at the club where he was caddying (TR. III-45); that semen stains on the front of those trousers (no wet spots were visible at the time of his arrest [TR. 258]), could have come from relationships that he had previously had with young ladies (TR. III-46). (No semen had been found on his shorts [TR. 128]). Defendant Calhoun testified that he had before his arrest been at a carry-out on Georgia Avenue (TR. III-47), and that previously thereto he had been at Florida Avenue and 7th Street (TR. III-48) at approximately 1:30 or 2:00 a.m. with two friends whom he identified by name (TR. III-49) who left him and took a bus up Georgia Avenue, but that he did not know where they lived or where to find them or get in touch with them (TR. III-50); that he had walked from Florida Avenue and 7th Street to the point at which he was arrested (TR. III-52), and had seen no one during his walk that he knew (TR. III-52).

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Defendant Fields (TR. III-59 et seq.) stated that he

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went up on the playground to get some water and that when he came back that Michael or Mack and the prosecutrix were lying on the ground together on the playground and that he saw the prosecutrix pull off her underclothing (TR. III-60) whereupon he "acted as though I wasn't there." After the relationship had been concluded and the prosecutrix "was still on the ground," Fields went over to the prosecutrix and started talking with her when while defendant Fields was still on the ground with her "about ten or twelve young men came out of the bushes"; that the prosecutrix had a voluntary relationship with one of them and then when she tried to run away, the boys tore the clothes off her; that when the police came, they all ran away; that Fields did not have sexual relations with the prosecutrix (TR. III-63). Defendant Fields testified that he did not know Michael's last name nor did he know where Michael lived (TR. III-64). Fields also testified that he did not see any sexual contact between the prosecutrix and the others present "other than the normal kind"; that no one committed oral sodomy and that he did not either (TR. III-78); that the boys had told him to "sit down if I didn't want to get hurt" (TR. III-83); that he did not know defendant Calhoun (TR. III-84) and that Calhoun was not one of the boys on the playground (TR. III-84); that if you are not used to the playground, you cannot see there at night (TR. III-87).

MISSING WITNESSES

The Assistant United States Attorney argued to the jury that because neither Calhoun nor Fields produced their acquaintances that the jury should draw the inference that those acquaintances

would not support the testimony of defendants (TR. III-113, 114). The Assistant United States Attorney in his rebuttal again argued that defendant Calhoun would or could have easily brought in his alibi witnesses and that defendant Fields could have produced the witness Michael "if indeed there is a Michael" who could have testified for defendant Fields (TR. III-142, 143). He concluded his argument alleging fault on the part of defendants for not producing witnesses whom they had themselves previously testified they did not know where to locate.

On this point the Court charged the jury a "missing witness" instruction leaving it "within the jury's discretion to draw the inference that the testimony of that particular witness would be unfavorable to the party who has failed to call that particular witness unless the absence of the witness is sufficiently explained" (TR. III-152).

And to that instruction, counsel for defendant Calhoun objected (TR. III-169).

THE COURT'S GENERAL CHARGE

The charge to the jury must be read as a whole. Parts of it will be referred to in Part 5 of Argument, infra.

STATEMENT OF POINTS

1. The Assistant United States Attorney improperly argued to the jury that both defendants had failed to produce witnesses and that the inference should therefore be that the

witnesses would testify against the defendants. The learned Trial Judge improperly instructed the jury that it might apply the "missing witness" rule. The evidence did not support the inference that missing witnesses were available to defendants; on the contrary, the only testimony concerning the witnesses was that the defendants did not know how to communicate with them. With respect to Point 1, Appellants desire the Court to read the following pages of the reporter's transcript:

III-50
III-64
III-113, 114
III-142, 143
III-169

2. The evidence of identification of defendant Calhoun was insufficient and was not in any manner corroborated. With respect to Point 2, Appellant Calhoun desires the Court to read the following pages of the reporter's transcript:

TR. 59, 60, 62, 107, 128, 132, 142, 143, 144,
171, 172, 174, 212, 215, 222, 229, 230 (cf. 59,
60), 231, 244, 258, 259, III-44 through III-52,
inclusive, III-84, III-87,

3. Evidence of the commission of sodomy by either defendant was insufficient and was not in any manner corroborated. With respect to Point 3, Appellants desire the Court to read the following pages of the reporter's transcript:

TR. 54, 55
III-78

4. The evidence does not support conviction of either defendant for aiding and abetting the activities of the other. With respect to Point 4, Appellants desire the Court to read the following pages of the reporter's transcript.

TR. 101
III-84

5. The learned Trial Judge failed plainly and without confusion to instruct the jury on the issues of (a) identification, (b) corroboration, (c) aiding and abetting, and in general failed to give the jury a clear understanding of the issues. With respect to Point 5, Appellants desire the Court to read the following pages of the reporter's transcript:

TR. III-146 et seq.

SUMMARY OF ARGUMENT

1. It is error for the Trial Court to permit argument to the jury by the prosecutor, and thereafter to instruct the jury, that an unfavorable inference may be drawn from failure of defendants to produce witnesses on their behalf, when the evidence showed that the defendants did not know where to find the witnesses to whom reference was made. In this respect the error was pointed out to the learned Trial Judge by counsel for one of the defendants, Calhoun. The Assistant United States Attorney emphasized the foregoing argument not only in his closing argument to the jury in chief, but he concluded his rebuttal argument to the jury with that point. Hence, it cannot be said that the argument and the instruction of the Court constituted harmless error. This alone should justify reversal of both convictions.

2. Defendant Calhoun was identified only by the prosecutrix. It is clear that the playground area was dark. Two persons who lived in the area so testified. They were completely disinterested. Street lights were not visible in the area. The prosecutrix at the time that the incident occurred at the playground

was found to be hysterical and crying. Obviously, she must have been tremendously excited and emotionally disturbed at the time. Defendant Calhoun was stopped some distance away from the playground by one police officer and released. A few minutes later he was arrested by a detective sergeant. There were no wet spots on his trousers. Although evidence of the presence of semen on his trousers was introduced by an FBI Agent, the length of time during which the semen had been on the trousers could not be stated or estimated. There was no way of telling how long it had been there. There was no semen on the undershorts. Defendant Calhoun testified that he had not been at the playground that evening but had been elsewhere. There was a complete absence of corroboration of the charge made by the prosecutrix. Grass stains on the trousers of defendant Calhoun were explained as having been caused during his occupation as a caddy at a local country club. The FBI Agent could not identify the grass stain and found no evidence of an interchange of fibers between the clothing of the prosecutrix and the clothing of defendant. No hairs of the prosecutrix were found on Calhoun's clothing. Hence, except for a charge made by the prosecutrix that defendant Calhoun had been on the playground and had attacked her, there was no evidence inculcating defendant Calhoun. The charge of the prosecutrix originated out of a series of events which included her emotion, hysteria, and a darkened area on a playground at about 2:30 a.m. in the morning. As a result of the lack of substantial evidence and the complete failure of corroborating evidence, the learned Trial Judge should have directed a judgment of acquittal for defendant Calhoun in accordance with the technical motions made by the defense. Defendant Fields,

on the other hand, testified that defendant Calhoun had not been on the playground that evening.

3. There was no evidence whatever to corroborate the charge that either defendant had committed sodomy. A mere charge by a prosecutrix without some evidence to corroborate it should not be held sufficient to permit the conviction of such a serious crime.

4. The two defendants were apparently complete strangers to each other. Defendant Fields under the circumstances of this case, could not as a matter of law, have aided or abetted defendant Calhoun. Nor, was there evidence that defendant Calhoun aided or abetted defendant Fields. Thus, the learned Trial Judge should have granted the technical motions of defense counsel on the charge of aiding and abetting.

5. The learned Trial Judge charged the jury without plainly pointing out the necessity of proof in respect of (a) identification of each defendant, (b) corroboration of the charge in respect of each defendant, and (c) aiding and abetting on the part of each defendant. Despite the obvious care taken by the Trial Judge in the delivery of his instructions, a reading of the charge indicates that there was no area in which the jury could proceed in deliberating whether or not defendant Calhoun had been identified beyond a reasonable doubt, had committed sodomy by evidence establishing guilt beyond a reasonable doubt, that the charge of the prosecutrix had been corroborated beyond a reasonable doubt, and that Calhoun had been proved guilty of aiding and abetting beyond a reasonable doubt. Nor was there any area in which the jury was left to deliberate in respect of whether or not sodomy had been

proven on the part of defendant Fields beyond a reasonable doubt, rape beyond a reasonable doubt, aiding and abetting defendant Calhoun beyond a reasonable doubt, and corroboration of the charges made by the prosecutrix beyond a reasonable doubt. No problem of identification remained in respect of defendant Fields in view of his own testimony of his presence at the playground.

ARGUMENT

1. The "Missing Witness" Rule inappropriately argued by the prosecutor and erroneously included in instructions to the jury.

As has been shown, defendant Calhoun testified that the acquaintances with whom he had been talking at 7th and Florida Avenue, N. W. lived in places unknown to him and that he did not know how to communicate with them. Defendant Fields testified that he did not know how to communicate with the person identified as "Michael," or "Mack," the man who had gone on to the playground with him and the prosecutrix. There was no basis for an inference that any of the witnesses mentioned were available to either of the defendants.

An authoritative textbook, 29 Am. Jur. 2d, Evidence, §180, Note 5, p. 225 states as follows:

"In effect, when it is shown why the witness was not called upon to testify and the reasons for not calling him are reasonable and proper, no inference that his testimony would be unfavorable is permitted."

Egan v. U. S., 52 App. D. C. 384, 394, 395, 287 Fed. 958 (1923) in effect supports the same principle of law, as does Billeci v. U. S., 87 U. S. App. D. C. 274, 278, 184 F.2d 394 (1950).

In Critzer v. Shogogue, 236 Md. 411, 204 A.2d 190, 195

(1964), the Court said:

"However, when it is shown why the witness was not called upon to testify and the reasons for not calling him are reasonable and proper, no inference that his testimony would be unfavorable is permitted (citing cases)."

That the argument made to the jury was believed by the Assistant United States Attorney to be compelling in this area, is borne out by the fact that he referred to it at some length, not only in his closing argument in chief, but concluded his rebuttal by reiterating and emphasizing the failure of the defendants (without carefully distinguishing between them) to call witnesses to support their statements. Hence the errors permitted in the arguments made, and in the instruction given, were material and should result in a reversal of the convictions with an order for a new trial in this phase of the case.

2. Identification of Defendant Calhoun
insufficient and not corroborated.

The only evidence against defendant Calhoun was the statement of the prosecutrix that she recognized him when he was presented to her later either at the scene or at the police station. The area in which she had alleged that the attack occurred, was dark. Neighbors who heard her call for help were unable to see the people involved or to know how many were there because of the darkness. The incident must have been a stirring emotional experience, at the least, and that the nineteen year old prosecutrix was hysterical as a result is inevitable. There is no evidence to corroborate the allegation of the prosecutrix that Calhoun was in fact on the playground at the time the incident occurred. He was

stopped by one police officer and released some blocks from the scene. Later, he was arrested by a detective sergeant, and taken back to the scene. The similarity of his shirt certainly could have been coincidence. There were no wet spots on his trousers when he was arrested (TR. 258) and the semen which the FBI Agent identified as having been found upon his trousers was of indeterminate age. It could not be stated how long the semen had been there. On the other hand, there was no semen on his shorts.

Under the rule of Cooper v. U. S., 94 U. S. App. D. C. 343, 345, 218 F.2d 39 (1954), it cannot be said upon the evidence in this case, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, that a reasonable mind might fairly conclude guilt beyond a reasonable doubt. It must be said upon the evidence in this case that there must be such doubt in a reasonable mind, that a judgment of acquittal should be entered in favor of defendant Calhoun. Within the rule of the same case, it must be said that there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. It would seem that even within the rule of Walker v. U. S., 96 U. S. App. D. C. 148, 223 F.2d 613 (1955) that there has not been sufficient corroboration of the presence of defendant Calhoun at the scene to support a conviction based solely on the statements of a hysterical witness, of doubtful character, on a darkened playground area.

That the identification by the prosecutrix is unreliable is further based upon the fact that she testified that defendant Calhoun wore pants which she thought were brown (TR. 59,60) while the trousers worn by Calhoun were in fact grey (TR. 230). Hence, the identification by the prosecutrix is subject to the test

required in Franklin v. U. S., 117 U. S. App. D. C. 331, 330 F.2d 205 (1964). From Franklin, supra, it is clear that corroboration of identification is just as essential as corroboration of the principal charge of the offense itself. In the case at bar, within the rule of Franklin, unlike Walker, supra, corroboration is clearly insufficient. See also Farrar v. U. S., 107 U. S. App. D. C. 204, 275 F.2d 868 (1959); Larkin v. U. S., 108 U. S. App. D. C. 239, 281 F.2d 72 (1960); cf. Roberts v. U. S., 109 U. S. App. D. C. 75, 284 F.2d 209 (1960).

3. Evidence of sodomy was insufficient and
not corroborated.

The only evidence of sodomy introduced in the case (TR. 54, 55) was as follows:

"Q And then what happened?

A Well, then they took me over to the picnic table and John got back on me and put his privates in my mouth and Seymour did too.

Q In your mouth?

A Yes.

* * * * *

Q During this incident, Mrs. Ward, did Seymour do anything else?

A Sexual intercourse too.

Q Was this on the table or on the ground?

A Under the table.

Q What specifically did he do to you?

A He took his privates out and put it in mine and then he put his privates in my mouth."

The foregoing evidence must be viewed in the light of the fact that the prosecutrix was about nineteen years of age, infected with a venereal disease, and voluntarily went on a darkened playground after 2:00 a.m. with two men whose full names she did not know and of whom she had had knowledge only for about several hours. Her manner of arriving at the playground was, as has been stated,

bizarre in the utmost, and it makes no difference whether her version of having arrived there is accepted as true or the version of defendant Fields is accepted as true. In either case it is incredible that the young lady would have conducted herself in the manner that she described, or in the manner described by defendant Fields, in the light of her background and history, if she had not been experienced in some respect. Hence, the brief statement that she made concerning the sodomy could have been added out of hatred or revenge for what she felt had been done to her by a group of boys who suddenly appeared out of the darkness. Fields denied the commission of the act and denied having seen anyone else commit it. Calhoun denied having been at the playground and Fields corroborated that statement. It is unthinkable that a conviction and sentence for sodomy could rest upon such slight evidence.

As has been said, Kelly v. U. S., 90 U. S. App. D. C. 125, 130, 194 F.2d 150 (1952):

"Added together, that evidence inescapably, it seems clear to us, produces a reasonable doubt as to guilt. It seems to us that the uncorroborated word of this particular officer under these particular circumstances could not establish beyond a reasonable doubt that this defendant was guilty of this offense. The inescapable doubts are reasonable ones. We have many times reviewed the sufficiency of the evidence in criminal cases and have upon occasion reversed for lack of sufficient evidence to convict. We are of clear opinion that this judgment of conviction must be set aside for lack of the requisite proof to convict."

Another but different case of the same name, at the level of the Trial Court, indicates the reluctance of the Trial Court to permit a conviction of sodomy to stand, albeit for somewhat different reasons. U. S. v. Kelly, 119 F.Supp. 217 (D.C.D.C. 1954).

4. Conviction of either defendant for aiding and abetting the other is not supported by the evidence.

The prosecutrix testified that when she went on the playground area, defendant Fields, after the boys appeared, did not talk to them, and did not seem to know them. The prosecutrix utterly failed to testify that Fields assisted the alleged rapists in any manner. On the other hand, she also utterly failed to testify that defendant Calhoun assisted defendant Fields in any manner. Fields testified that Calhoun was not at the playground. Calhoun also testified to the same effect.

There is a complete absence of evidence that either of the two defendants assisted the other. Hence, the charge of aiding and abetting should not have been submitted to the jury at all but the Motion for Judgment of Acquittal should have been granted when made, and if not clearly made, entered sua sponte by the Trial Judge.

The only possible support for a conviction of either of the defendants for aiding and abetting the other would lie in the realm of mere speculation, in this, that defendant Fields lured prosecutrix upon the playground for the purpose of making it possible for defendant Calhoun to appear there. The evidence, however, is directly to the contrary because there was no sign of recognition between the two defendants, as has been stated, and no conversation between them.

Under the rules of the cases cited above, in respect of sex offenses, then, it would plainly appear that reasonable minds must have a reasonable doubt of the propriety of the conviction, so that as a matter of law, judgment of acquittal should be entered.

5. The instructions to the jury were erroneous, incomplete and confusing.

A reading of the charge of the learned Trial Judge indicates the confusion which must have been in the jury's mind because of the two defendants being respectively charged with rape and sodomy, each, and again charged with aiding each other in the commission of those two offenses. As a result, there were four convictions of each defendant for two similar charges. The instructions of the learned Trial Judge did not divide the case into phases of discussion: corroboration of identification of the defendant Calhoun, corroboration of the charges made, and the possible guilt or innocence of each of the defendants of the charge of aiding and abetting the other.

Instead of breaking the charge in two parts so that the guilt or innocence of each defendant could be separately considered, the charge sought to present the applicable principles of law, to the extent to which it went, in a joint form, undoubtedly leaving unutterable confusion in the minds of the jury concerning the situation.

With the utmost deference for the learning, experience, and impartiality of the Trial Judge, whether the charge is considered as a whole or in separate parts, some confusion must have existed. For instance (TR. III-154), the learned Trial Judge stated to the jury as follows:

"Now I am not going to read you the fourth count because it is the same as the third, and as I have told you before you will have a copy of it for your jury room."

Obviously, the fourth count was not the same as the third.

Again, (TR. III-155) the Trial Judge charged the jury as follows:

"Your attention must be directed to this single question, and all extraneous matter must be laid aside except to the extent that it assists you in defining the principal issue or deciding the principal issue in the case, namely, whether the act was committed forcibly and against the will of the complaining witness."

The foregoing quotation, of course, is out of context in that at that point the Trial Judge was discussing the question of rape. However, although the Trial Judge did charge on the question of aiding and abetting, even in the context in which the foregoing statement was made, it was bound to leave some indelible confusion in the mind of the jury because obviously in the case at bar, there was not a "single question." This simply emphasizes that the jury may have been considering "whether the act was committed forcibly and against the will of the complaining witness" when there were many other questions in the case to be determined, namely, corroboration of the testimony of the prosecutrix that she in fact was raped (in which there did seem to be ample evidence), but whether the defendant Fields committed the rape and whether the defendant Calhoun was on the playground at all, and if so, whether either of them committed sodomy or aided or abetted the other.

Again (TR. III-158), almost an entire page of instructions leaves the question to the jury of whether the prosecutrix was attacked, when obviously her torn clothing and naked condition, coupled with hysteria could lead to no other conclusion. Moreover, the element of consent in respect of defendant Calhoun was not in the case at all. On the next page of the transcript (TR. III-159) reference to "the presence or absence of the deadly weapons or

dangerous weapons" seems to be without any evidentiary support, because there is no evidence or testimony concerning the presence or absence of deadly weapons or dangerous weapons throughout the entire trial. On the same page of the transcript, assuming that it is correctly transcribed, there is a reference to the jury being "convinced beyond a reasonable doubt that the defendant committed rape on the complaining witness" when there were two defendants involved in the trial of the case at bar.

On the following page of the transcript (TR. III-160), in the light of the charges against the defendants for aiding and abetting the other, the portion of the charge referring to "defendant or the defendants" would seem to leave nothing but confusion in the minds of the jury.

In connection with the definition of the crime of sodomy (TR. III-162) the Court gave a brief and incomplete definition of the elements which the government is bound to prove in connection with the charge of sodomy. For instance, no reference is made to the necessity of proof of corroboration of the commission of the act beyond a reasonable doubt, and no reference is made to the necessity for proof of the identity of the defendant beyond a reasonable doubt. There was a complete absence of the definition of corroboration, as such, and the necessity for the proof of circumstances beyond a reasonable doubt from which the jury might find each of the defendants respectively guilty.

In connection with the definition of the charges of aiding and abetting (TR. III-164) et seq.), the learned Trial Judge charged as follows:

"Now if you have a reasonable doubt that the defendant did not, that is either one

of the defendants did not aid or abet another in the said crime, then and in that event you would find the aider or abetter not guilty."

It is submitted most respectfully that the charge in this area was backwards; namely, that the charge should be the necessity of the jury finding beyond a reasonable doubt that either one of the defendants did aid or abet, not that the jury were to find beyond a reasonable doubt that either one of the defendants did not aid or abet. On the next page at the top, the learned Trial Judge charged as follows:

"The question for the jury to determine from all of the facts and circumstances is whether or not the defendant was acting in concert with another, and in this particular case with the other defendant in the commission of each of the offenses alleged to have been committed on Theresa Johnson."

In this area^{there is} a complete omission of the necessity for the "beyond reasonable doubt" finding. ~~the finding.~~

Again, (TR. III-165), the Trial Court completely omitted all reference to the necessity of proof beyond a reasonable doubt in the following words:

"If you find from all of the evidence that the government has failed to prove any of those essential elements, then you will find the defendant or the defendants not guilty."

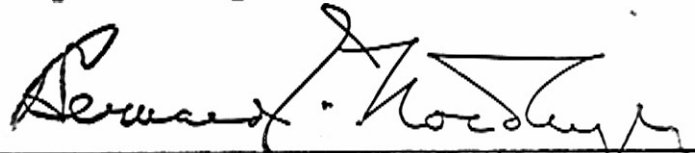
From the consideration of the foregoing, it is clear then that the Trial Court in its charge did not plainly and without confusion instruct the jury on the issues of (a) identification, (b) corroboration, (c) aiding and abetting, all of which are requisites in these heinous sex offenses.

In this connection the cases cited in the forepart of this brief stand as appropriate authorities.

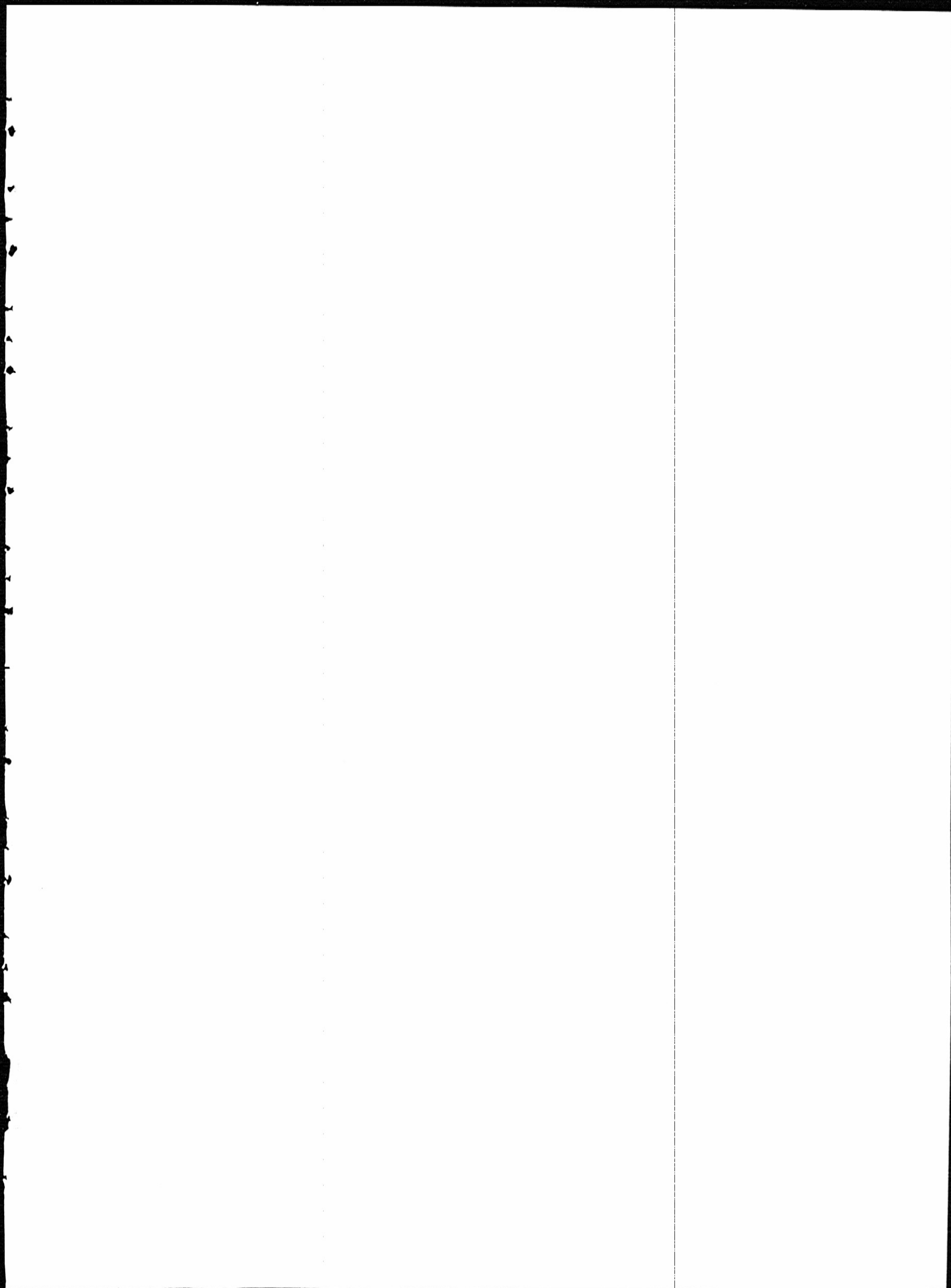
CONCLUSION

In view of the scant evidence adduced at the trial to establish the presence of defendant Calhoun and the alleged activities of defendants Calhoun and Fields at the playground in question, the utter lack of corroboration of the charges of sodomy, the utter lack of corroboration of identification of defendant Calhoun, the charge of the learned Trial Judge to the jury, a careful reading of the transcript of proceedings leaves the abiding conviction that the defendants have not had a fair trial in a legal sense. They have been convicted of four offenses when, at worst, each was but guilty of two. It is therefore forcefully urged that the conviction of the defendants be reversed; that a new trial be granted with appropriate instructions for the entry of judgment of acquittal on the charges of aiding and abetting and of sodomy, as to defendant Fields, and a judgment of acquittal be entered on all counts as to defendant Calhoun.

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,119

ROBERT CALHOUN, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

United States Court of Appeals
for the District of Columbia Circuit

No. 21,120

FILED MAY 2, 1968

Nathan J. Paulson
CLERK

CALVIN FIELDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 2, 1968

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CLERK

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Cr. 834-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Can appellants for the first time on appeal object to the prosecutor's summation and the trial court's instruction as they related to the issue of corroborative witnesses appellants had failed to have testify at trial? If so, did a sufficient factual predicate underlay the prosecutor's summation and the trial court's instruction on that issue? If not, did appellants suffer plain error affecting substantial rights by that portion of the prosecutor's argument and the trial court's instruction referring to absent witnesses?

2. Did sufficient evidence exist identifying appellant Calhoun as one of the prosecutrix' attackers?

3. Need this Court consider appellant's remaining evidentiary contentions in circumstances where their resolution in appellants' favors would not alter the length of sentences appellants must serve? If so, did sufficient evidence exist to corroborate the *corpus delicti* of the sodomy committed against the prosecutrix? Did sufficient evidence exist to support appellants' convictions for aiding and abetting one another in commission of the rapes and sodomy attacks?

4. Can appellants object for the first time on appeal to the general form of the trial court's instructions on grounds that the jury was not instructed on the applicable law as to each appellant separately? If so, did the trial court abuse its discretion in instructing the jury on the applicable law in the case as to both appellants jointly. In the event ambiguities in the instructions occurred, were they of such dimension as to constitute plain error effecting appellants' substantial rights?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,119

ROBERT CALHOUN, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,120

CALVIN FIELDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a four count indictment filed June 27, 1966,¹ appellants Calhoun and Fields were each charged with commission of rape and sodomy against one Theresa Johnson

¹ The full indictment appears at 44, 45, *infra*.

(in violation of 22 D.C. Code §§ 2801 and 3502), and were each charged with aiding and abetting the other in the commission of these acts (in violation of 22 D.C. Code §§ 105, 2801 and 3502).² After a joint trial from March 20 through March 23, 1967, before United States District Court Judge Leonard P. Walsh and a jury, appellants were found guilty as charged. On the following day, appellant Calhoun was sentenced under the Federal Youth Corrections Act to a period not to exceed 10 years, concurrently with all counts. Appellant Fields was sentenced to 4 to 12 years on counts one and two and, 3 to 10 years on counts three and four, all sentences to run concurrently.

At trial, the following transpired.

I. The Government's Case

A. *Testimony of the Prosecutrix, Theresa Johnson Ward*

The Government opened with the testimony of the victim, Theresa Johnson Ward. At the time of the events in question Mrs. Ward was single—Theresa Johnson by name—and nineteen years of age. She was new to Washington, D.C., having recently moved to this city from Rosehill, North Carolina. (Tr. I 71.) Mrs. Ward described in detail the events of May 30 and May 31, 1966 culminating in a series of rapes and unnatural acts committed on her at the Raymond Playground next to the Raymond School, Washington, D.C.

Mrs. Ward and a girlfriend, one Esther Perry, lived in separate rooms at a rooming house at 1364 Oak Street, N.W., Washington, D.C. On the night of May 30, 1966 they were visiting one Bell Smith at 1306 Euclid Street,

² Appellant Fields was released on pre-trial bond on August 22, 1966. He remained free until October 16, 1966 when he was arrested for assault with intent to rob in Cr. 1343-66. Appellant Calhoun was released on pre-trial bond on November 4, 1966, having spent some 60 days in Saint Elizabeths pursuant to a mental examination he requested. Although the record is unclear, appellant Calhoun was apparently on bond throughout the entire course of the proceedings.

N.W. Miss Perry left Miss Smith's apartment at midnight and returned one-half hour later in an upset state (Tr. I 43, 45). Miss Perry indicated that she had just been informed by the landlady of the rooming house where she and the prosecutrix lived that her brother had been shot. Mrs. Ward agreed to accompany Miss Perry home. On the way home, Miss Perry stopped at a phone booth at 14th and Euclid Streets, N.W. to call her mother.

The Ruse

As Mrs. Ward and Miss Perry were by the telephone booth, a boy came up to them and attempted to comfort Miss Perry who was upset and crying. He introduced himself as "Seymour." Mrs. Ward identified appellant Calvin Fields as the individual calling himself "Seymour". Mrs. Ward had never before that evening seen him (Tr. I 45, 46, 47, 70, 71). Shortly thereafter another boy came up to them and identified himself as "Michael". (Tr. I 47). Appellant Fields told the girls that Michael was his "brother" (Tr. I 92).

The two girls, Michael and appellant Fields walked back to the girls' rooming house on Oak Street. Miss Perry went directly to her room. As she was leaving the foyer, appellant Fields, sitting in the foyer, "acted as if he was having an asthma attack" and "fell on the floor like he was dying" (Tr. I 48). He lay on the floor gasping and looking ill (Tr. I 90-91). Mrs. Ward got appellant some water. She then offered to help Michael take appellant Fields home. She and Michael left the roominghouse with appellant Fields between them, leaning on their shoulders (Tr. I 48, 49).

As they were walking toward appellant Fields' home, Mrs. Ward was told that his home was not a great distance. This she believed. Once having helped appellant Fields home, she intended to take a cab back to the rooming house. (Tr. I 77, 78). However when the group passed the Raymond School, an area unfamiliar to Mrs. Ward, appellant Fields started gasping again and stated

that he needed some more water. He and Michael left Mrs. Ward and went to the school building ostensibly for this purpose. Appellant Fields was walking upright, unsupported by Michael. Michael returned first and appellant some ten minutes later. Appellant acted ill and stated that he wished to sit on a nearby picnic table. Michael and Mrs. Ward helped appellant to the picnic table an the Raymond Playground where appellant Fields sat down. (Tr. I 49, 50, 77, 96, 97).

The Attacks

The three of them—appellant Fields, Michael, and Mrs. Ward—were alone at the picnic table for some moments. Then a group of nine or ten boys came out of the shadows. One of the group stated to the victim that “him name was John,” and that he was “their leader” (Tr. I 113). “John” knocked Mrs. Ward down and got on top of her. “John” then stated to Mrs. Ward that if she didn’t do what he wanted “he would let all of them get her” (Tr. I 51, 52). Mrs. Ward identified appellant Calhoun as the individual calling himself “John” (Tr. 51-52). She testified that having knocked her down, appellant Calhoun, his pants then open, proceeded to have sexual intercourse with her: “He had his privates in me . . . in [my] privates” (Tr. I 53).

Appellant Fields and the other boys were “all crowded around say remarks” (Tr. I 53). Mrs. Ward screamed and appellant Calhoun choked her. The entire group was momentarily distracted by the bark of some nearby dogs. Mrs. Ward attempted to escape but was grabbed by one of the group. All of the boys ripped her clothing off (Tr. I 53, 54). She was taken to the nearby picnic table where appellant Calhoun got back on top of her and “put his privates in [her] mouth” (Tr. 54-55). She testified that at this point appellant Fields committed oral sodomy on her (Tr. 54-55). Mrs. Ward stated that during this incident appellant Fields also had sexual relations with her: “He took his privates out and put it in mine . . .” (Tr. 55). She reiterated her testimony

that appellant Fields had "put his privates in [her] mouth" (Tr. I 55). A third unnamed individual also had intercourse with her (Tr. I 56).

During the course of the rapes, Mrs. Ward saw the features of both appellants. Appellant Calhoun's face stuck in her mind. She saw his clothing. She had previously been with appellant Fields for around "two hours", part of which time was on 14th Street, a brightly lighted street (Tr. I 110, 111). Her attackers were eventually frightened off by some barking dogs and immediately thereafter the police arrived. Mrs. Ward was at this time completely naked. (Tr. I 57).

The Arrests and Identifications

After indicating the direction in which her attackers fled, Mrs. Ward remained at the scene with the police. Appellant Fields was sometime thereafter brought to the scene in the custody of the police. Mrs. Ward recognized and identified him. She further testified that she recognized and identified appellant Calhoun in custody of the police that same evening either at the scene or later at the Stationhouse (Tr. I 61, 62). Mrs. Ward testified that two other individuals were brought before her for identification and she recognized and identified one but not the other (Tr. I 62).

Mrs. Ward identified Government exhibits 1 through 5 as the clothing she had worn that evening which her attackers had ripped off (Tr. I 56-59). She described appellant Calhoun's apparel that evening as a "fishnet sweater, and a T-shirt and a pair of khakis" (Tr. I 59) and identified Government's Exhibit 6 as the same type of shirt appellant Calhoun was wearing when he attacked her (Tr. I 60). Government exhibits 8 and 9 were identified by Mrs. Ward as photographs taken of her revealing marks on her body caused by the attacks. Photograph 8 showed her swollen face and photograph 9 showed bruises on her back. They were received in evidence without objection (Tr. I 66-69).

Mrs. Ward testified that she never again saw the boy called "Michael" (Tr. I 71). During cross-examination Mrs. Ward stated that on the day in question she had a type of venereal disease (Tr. I 81-82).³ She further stated that she could see no sign of recognition between appellants Fields and Calhoun during the attacks (Tr. I 100-101).

B. Cornelius McWright, Special Agent, FBI

Cornelius McWright, Special Agent for the FBI assigned to the FBI Laboratory, testified that he had received certain items of clothing from Sergeant DeMilt of the Metropolitan Police Department, including the victim's clothes and pants and underclothing of appellant's Calhoun and Fields (Tr. I 117, 118). Having been qualified as a chemical expert, Agent McWright testified that he had detected semen on the pants of both appellant Fields and Calhoun, as well as on the victim's torn brassiere, her skirt and a portion of her torn slip (Tr. I 118, 119). The pants of both appellants contained seminal stains on the fly areas (Tr. I 122-23). Semen was also found on appellant Fields' undershorts (Tr. I 123). No semen was found on appellant Calhoun's undershorts (Tr. I 128). Agent McWright further testified that the age of seminal stains could not be reliably determined, however washing or drycleaning generally removed them (Tr. I 132). He indicated that he knew of no test whereby a venereal disease could be identified on clothing (Tr. I 135).

C. Morris Samuel Clark, Special Agent, FBI

Morris Clark, Special Agent for the FBI assigned to the FBI Laboratory, testified as to examinations made by him on the clothing of appellants Fields and Calhoun and that of the victim, Theresa Johnson Ward. He testified

³ Mrs. Ward was unclear as to the time when she acquired the disease. She did indicate that she had treatment in the early part of 1966 (Tr. III 30-32).

that both the pants of appellant Fields and those of appellant Calhoun contained plant stains on the knee areas (Tr. I 139, 140). Agent Clark testified that he was unable to determine any interchange of fibers between the two appellant's clothing and that of the victim. He was further unable to find any hairs similar to those of the victim on either appellants' clothing (Tr. I 142, 143).

D. Esther B. Perry

The victim's companion, Esther B. Perry, testified that she and Mrs. Ward were present on the evening in question at Bell Smith's House at 1306 Euclid Street, N.W. A little after midnight on the morning of May 31, 1966, she left Miss Smith's and by cab went to the rooming house at 1364 Oak Street (Tr. II 149, 150). On arriving there, she was informed by her landlady that she had received several telephone calls to the effect that her brother had been killed. With the help of her boyfriend, one Bernard White, to whose house she then went, Miss Perry spent the following hour investigating these calls. (Tr. II 151, 154, 155).

Miss Perry first encountered the individual who identified himself as "Seymour" on her way to Mr. White's house. She did not know him but had seen him several times previous around the neighborhood. Miss Perry identified appellant Fields as the individual calling himself "Seymour" (Tr. II 151, 152). Although she refused his company, Fields insisted on accompanying her to her boyfriend's house and thereafter to her brother's⁴ house in Mr. White's car (Tr. II 151, 152, 153, 158). After finding the rumors to be unfounded, Mr. White drove Miss Perry back to Bell Smith's where she intended to meet Mrs. Ward. Appellant Fields accompanied them on the return trip and alighted from the car somewhere near Bell Smith's house. Miss Perry arrived and met Mrs. Ward sometime after 1:00 A.M. (Tr. II 154, 155).

⁴ A different brother than the one rumored to have been killed.

Miss Perry and the prosecutrix, Mrs. Ward, left Bell Smith's shortly thereafter. Still upset, Miss Perry stopped at a telephone booth along the way to call her mother. After finishing the phone call she again encountered appellant Fields standing by the telephone booth. Appellant Fields continued to press his solicitations on Miss Perry who was crying at the time. Disregarding her protest to leave, appellant Fields walked with Miss Perry back to the rooming house on Oak Street. Both walked ahead of Mrs. Ward and when Miss Perry next turned around she saw another boy walking next to Mrs. Ward (Tr. II 155, 156). "[Appellant Fields] said it was his brother Mike . . ." (Tr. II 156).⁵

On returning to the rooming house, ". . . [Appellant Fields] began acting funny and couldn't get his breath" (Tr. II 159). Mrs. Ward went upstairs to get appellant Fields some water and Miss Perry accompanied her. Miss Perry remained upstairs. About ten or fifteen minutes later, she saw the three of them leave. Mrs. Ward and the individual called "Michael" were carrying appellant Fields on their shoulders (Tr. II 159, 160, 161). Miss Perry did not see Mrs. Ward again until sometime the next morning (Tr. II 157).

E. St. Elmo Smith

St. Elmo Smith testified that he lived at 924 Quincy Street, N.W., adjacent to the Raymond School and the Raymond Playground (Tr. II 168, 169). On the night in question, he was awakened by his son and heard a female voice scream weakly, "Help, please help" from the area of a recreation shack and picnic table on the playground (Tr. II 169, 174). He told his wife to notify the police. "In less than five minutes" they arrived at the playground (Tr. II 170). Mr. Smith indicated that there was not too much lighting in the area, however from his

⁵ At no time during this episode did Miss Perry see Mrs. Ward hold hands with or engage in any petting with "Michael" or appellant Fields.

vantage point some distance away he was able to see four or five figures on the playground (Tr. II 172, 174). Mr. Smith was unable to distinguish facial features.

F. Officer Hubert L. Cave, Metropolitan Police Department

Officer Hubert L. Cave, of the Metropolitan Police Department Canine Corp, testified that at approximately 2:25 A.M. on the morning of May 31, 1966, he responded to a radio call that a woman was screaming for help on the Raymond Playground.⁶ On arriving at the playground he observed Mrs. Ward some thirty feet from the picnic table crying and completely nude except for a skirt she held up in front of her. She stated to him that she had been attacked and indicated to Officer Cave that her attackers had run out of the playground in a northeasterly direction. Officer Cave then drove north on 10th Street and east on Quincy Street to the intersection of 9th Street and Rock Creek Church Road, an area near the northeast corner of the playground. (Tr. II 176, 177, 178, 183, 192). There Officer Cave observed appellant Fields breathing heavily as he walked in a westerly direction. His trousers had grass stains on his knees and wet spots in the vicinity of his fly. Officer Cave at this time took appellant Fields into custody and transported him back to the Raymond Playground. (Tr. II 178, 179, 194).

Appellant Fields was there immediately identified by Mrs. Ward as one of her attackers—the individual called “Seymour” (Tr. II 179). Officer Cave testified on cross-examination that he did not see any street lights in the four pictures of the playground area offered by the Government as Exhibits 15 (a), (b), (c) and (d). Although unable to recall the exact lighting in the area, Officer Cave testified that the night was not “real black”. (Tr. II 191).

G. Officer Charles G. Claus, Metropolitan Police Department

Officer Charles G. Claus, of the Metropolitan Police Department Canine Corp, testified that he responded to a

⁶ Officer Charles G. Claus was with Officer Cave through this entire episode.

radio call that a woman was being assaulted on the Raymond Playground. He was accompanied by his partner, Officer Cave (Tr. II 195, 196). Officer Claus reiterated in substance the series of events related by Officer Cave culminating in appellant Fields' arrest and identification.

He testified that when he and his partner encountered appellant Fields at 9th Street and Rock Creek Church Road, northeast of the playground, appellant Fields was breathing and perspiring quite heavily, as if he had been running. He had wet stains on the fly of his trousers and grass stains on the knees of his pants (Tr. II 197). Officer Claus stated that Mrs. Ward had identified appellant Fields as one of her attackers after they transported appellant Fields back to the Raymond Playground (Tr. II 198). Officer Claus identified the clothing previously referred to at trial as having semen stains to be that taken by him from appellant Fields after arrest (Tr. II 198-201).

On cross-examination, Officer Claus indicated that it was not a "real dark night", but rather about "average", and that he believed there was a street light at the entrance to the playground (Tr. II 204). He testified that he could recognize the features of Mrs. Ward on the playground at a distance of "10 to 12 feet" and could see her from a distance of some thirty feet (Tr. II 206).

H. Timothy Smith

Timothy Smith, of 924 Quincy Street, N.W. and the sixteen year old son of St. Elmo Smith, testified that the window of his bedroom faced the Raymond playground about 25 yards away. Sometime before 2:00 A.M. on the morning of May 31, 1966, Timothy was awakened by the barking of his dogs which he kept in the backyard behind his house (Tr. II 207, 208, 209, 211). He then "heard a boy tell a girl to shut up or he would smack her" (Tr. II 209). He heard a girl yell "Help, Help" and another male voice say something inaudible (Tr. II 210). After telling his father that "something was

going on over on the playground", Timothy came back to his window and heard some clothing tearing . . . something being destroyed" (Tr. II 210). All the noise came from the direction of the recreation building on the playground (Tr. II 214). Timothy was unable to identify any of the parties involved because it was too dark to see to the center of the playground, some 75 yards away (Tr. II 213).

I. Officer Charles G. Wright, Metropolitan Police Department

Officer Charles G. Wright, Traffic Division, Accident Unit of the Metropolitan Police Department, testified to an encounter with appellant Calhoun in the area of Raymond Playground directly after the attack. Responding to the scene of the attacks at the Raymond Playground after receiving by radio information as to what had occurred, Officer Wright cruised the area. While cruising he saw appellant Calhoun running south on Georgia Avenue. Out of breath and perspiring heavily, appellant Calhoun was wearing a fishnet shirt with a border on the sleeves (Tr. II 216, 217, 221). Officer Wright stopped appellant Calhoun and asked him from where he had come. Appellant Calhoun replied a carry out shop; he was, however, unable to tell Officer Wright where it was located. At this moment, Officer Wright noticed two other boys coming up the street. He told appellant Calhoun to move along and picked up the other two individuals. Both were transported to the scene of the rape where Mrs. Ward identified one as her attacker. She could not identify the other who was eventually released (Tr. II 218, 221).

J. Officer Robert F. DeMilt, Metropolitan Police Department

Officer Robert F. DeMilt, Sex Squad of the Metropolitan Police Department, testified that he received a radio transmission at approximately 2:25 A.M. on the morning of May 31, 1966, that a rape had been committed on the Raymond Playground by five or six negro males, one dressed entirely in black (Tr. II 227, 228). Driving to

that area north on New Hampshire Avenue, he saw appellant Calhoun "trotting at a fair pace" on the west side of the street some two blocks from the playground. Officer DeMilt stopped appellant Calhoun and questioned him as to his immediately previous whereabouts. Appellant Calhoun replied that he had just visited a carry-out shop but was unable to remember its name. Appellant Calhoun had grass stains on the knees of his pants and was wearing a white fishnet shirt. (Tr. II 229, 252). Officer DeMilt noticed no semen stain on appellant Calhoun's trousers (Tr. II 258).

Officer DeMilt apprised appellant Calhoun of the rape on the Raymond Playground and transported him back there. On arriving there at approximately 2:30 A.M. he parked his car some 200 feet from the police car in which Mrs. Ward was then sitting (Tr. II 227, 230). Officer DeMilt, leaving appellant in his squad car with his partner, proceeded to the car in which Mrs. Ward was sitting. There he received from her a description of the subjects involved. Mrs. Ward indicated the ringleader to be an individual calling himself "John" with dark skin and wearing a fishnet shirt. Officer DeMilt then brought appellant Calhoun to the car where Mrs. Ward was sitting and Mrs. Ward immediately exclaimed "that is the ringleader", "He is the one who calls himself John"⁷ (Tr. II 231, 232, 250).

Officer DeMilt then scoured the area on the playground where Mrs. Ward had indicated the rapes to have occurred and found numerous pieces of clothing including a torn brassiere and a torn blue slip near the picnic table. He identified Government's Exhibits 1-5 as the articles he had there found (Tr. II 232-235). Officer DeMilt indicated that although there were no artificial lights he could see a good distance (Tr. II 236). Counsel for appellant stipulated as to the identity of the clothes taken from appellant Calhoun subsequent to his arrest (Tr. II 238). Officer DeMilt testified that he received

⁷ Officer DeMilt was clear that the exclamation was spontaneous (Tr. II 231, 250).

from Officer Claus the clothes of appellant Fields and gave them to Agent McWright of the FBI (Tr. II 239). At this time Government's Exhibits 1-8—consisting of the victim's clothing and the clothing of appellant Calhoun—were received in evidence without objection (Tr. II 240, 241). Officer DeMilt testified on cross-examination that he did not know appellant Calhoun was earlier stopped by Officer Wright when he stopped him on New Hampshire Avenue at 2:25 A.M. (Tr. II 250, 251, 252). He further testified that the lighting was such at the playground that individual features could be distinguished at twenty feet (Tr. II 253).

K. Dr. Anthony Cuomo

Dr. Anthony Cuomo, a Junior Assistant Resident in Medicine at D.C. General, testified concerning a routine gynecological examination performed on the victim, Mrs. Ward, at 4:10 A.M. on the morning of May 31, 1966. Having been qualified as an expert, Dr. Cuomo testified that a cervical smear was taken and intact sperms found in the cervix indicating recent intercourse (Tr. III 8, 10). A manual examination of the pelvic organs revealed no lacerations nor any recent tearing of the hymen. Dr. Cuomo indicated that forced intercourse could occur with the absence of such lacerations (Tr. III 9, 10). A gonorrheal smear was performed and found negative; a serological blood test for syphilis was performed and found positive (Tr. III 10). Such finding indicated that Mrs. Ward had been exposed to syphilis sometime in the past (Tr. III 10, 11). Dr. Cuomo testified that from the single serological test he performed, it was impossible to determine whether the syphilis organism found in Mrs. Ward was in the contagious phase such that it would be transmitted to a sexual partner or whether it was in a latent phase where it would not so transmit (Tr. III 10, 11, 22, 27, 28).⁸

⁸ It was at this point that Mrs. Ward was recalled to the stand. She was unclear as to when she contracted the disease although she

The Government rested and motions for acquittal made no behalf of both appellants were denied (Tr. III 35, 36). The Government indicated at the bench it would not impeach appellant Fields with a prior conviction for unauthorized use of a vehicle because of the importance of the jury hearing his own description of the events in question (Tr. III 37). It further indicated it would not seek to impeach appellant Calhoun (Tr. III 37).

II. The Case for the Defense

A. Testimony of Appellant Robert Calhoun, Jr.

Appellant Calhoun took the stand and offered the following alibi defense.⁹ Early on the morning of May 31, 1966, between 1:30 and 2:00 A.M., appellant Calhoun indicated he was at Florida Avenue and 7th Street, N.W. where he had been talking with two "friends", one "Cain Cooper" and one "Robert McCandless" (Tr. III 49, 50). Appellant Calhoun had known these individuals socially for sometime between one and three years. He indicated that neither was present at trial and that he did not know where the named boys lived nor how to get in touch with them (Tr. III 48, 49, 50).

After McCandless and Cooper boarded a bus, appellant Calhoun then testified that he walked up Georgia Avenue to the intersection of Georgia and New Hampshire Avenues, a distance of approximately one and one-half miles. He went to the "Block-Long Carry-Out Shop" in search of other friends (Tr. III 47, 48, 52). After first testifying that he didn't know how many individuals were present in the shop while he was there, appellant then related that "there wasn't anybody in the carry-out shop when I was

did indicate she received treatment early in 1966 (Tr. III 30-33). She further stated that during the period of treatment she drank some beer which was contrary to her doctor's instructions to have no alcoholic beverages (Tr. III 34, 35).

⁹ Counsel for appellant Calhoun made no attempt to elicit his alibi defense on direct examination. The entire alibi was brought forth by Government cross-examination.

in there" (Tr. III 48). Directly thereafter he indicated, however, "I didn't go in. I looked from the outside of the Carry-Out" (Tr. III 48). Appellant denied telling Officers Wright and DeMilt that he did not know where the carry-out shop was or what its name was (Tr. III 51).

Appellant Calhoun admitted wearing the trousers with grass stains on the knees and a fishnet shirt at the time of his arrest. He indicated that the grass stains resulted from his work as a caddy at Woodmont Country Club (Tr. III 44, 46, 47). Appellant fluctuated between denials that he was perspiring heavily when arrested and statements that he didn't know whether he was then perspiring or not (Tr. III 47, 54). He denied that he was running or walking quickly at the time of his arrest (Tr. III 47, 54). He indicated that on the night of his arrest he had no sexual relationship with any young lady (Tr. III 46). Appellant Calhoun stated that he was familiar with the Raymond Playground, having been there before (Tr. III 53, 55).

Appellant Calhoun testified that after arrest while incarcerated in the D.C. Jail and as a patient at Saint Elizabeths Hospital, he was given three blood tests. As a result of those tests, he was given no treatment and never received any penicillin (Tr. III 42, 43).

B. Testimony of Appellant Calvin Fields

Appellant Fields testified that he encountered Esther Perry sometime between 11:00 P.M. and 12:00 P.M. on the evening of May 30, 1966. Miss Perry was upset and he accompanied her to the home of a relative and then to 13th Street and Euclid where he left her. Later he met Miss Perry and the victim, Mrs. Ward, at a telephone booth on 14th Street. He indicated to the girls that he was walking in their direction and would accompany them. (Tr. III 56, 57, 58). Appellant Fields denied the use of the name "Seymour". He indicated

that he told the girls his nickname which was "Seedy (sic)"¹⁰ (Tr. III 76, 79).

At 14th and Harvard Streets, appellant Fields met a boy named "Mackie". He admitted telling the girls that Mackie (also referred by appellant as "Mack") was his "brother", but explained that he was merely "trying to help him along so far as the girls were concerned" (Tr. III 63, 64). Appellant Fields indicated that he did not know Mack's last name nor did he know where he lived.¹¹ However, he saw him sometimes on 14th Street about once a week and "[knew] some one that might know him" (Tr. III 64, 76).

The two girls, appellant Fields and Mack went to the house on Oak Street. Appellant testified that Mrs. Ward and Mack were "hugging and kissing" in the hallway (Tr. III 58, 59). After Miss Perry went upstairs, appellant asked for a glass of water because he was tired and hot. He denied ever having feigned an attack of asthma and stated that he had never suffered from that disease (Tr. III 68). As he and Mack left, appellant indicated that Mrs. Ward stated, "Wait a minute, I am going now" (Tr. III 59). Appellant was walking upright and Mrs. Ward was walking in the middle of the threesome (Tr. III 69).

Appellant Fields testified that as the group passed the Raymond Playground, he felt thirsty again. After returning from a trip to the basketball court to get a drink, appellant Fields claimed that he saw Mrs. Ward and Mack in a sexual encounter by the picnic table. He acted as if he wasn't there. Appellant Fields later went over to talk to Mrs. Ward as she lay by the picnic table. Just then, appellant claimed they were set upon by a group of ten or twelve boys (Tr. III 58, 59, 60, 70, 71). Mrs. Ward allegedly went up to one of the boys and started talking to him. Appellant Fields testified she said,

¹⁰ More likely the transcript should read "C.D.", corresponding to appellant Fields' first two initials.

¹¹ But see fn. 22 *infra*. "Mack" is the individual whom the prosecutrix and Miss Perry referred to as "Mike" or "Michael".

"John, I love you, I would do anything for you, just take me home" (Tr. III 60). Mrs. Ward allegedly voluntarily submitted to intercourse with "John". Others of the group then forced themselves on Mrs. Ward after she had tried to run. Appellant Fields testified that he was intimidated by their presence such that he could not assist her. All the while he remained seated on the ground. He denied himself having intercourse with her. Appellant Fields stated that he ran from the scene because if he remained at the scene of the rapes, he would be falsely incriminated (Tr. III 61, 62, 73, 74). He was unable to explain how the semen stains got on his trousers and undershorts except to say that they could have gotten on the weekend before (Tr. III 75). Appellant Fields himself denied committing sodomy on Mrs. Ward and testified that the nine or ten individuals whom he saw have sexual relations with Mrs. Ward did so in the 'ordinary way' (Tr. III 78, 79). He claimed that appellant Calhoun was not the individual called "John" and was not present on the playground during the rapes (Tr. III 84, 85, 86).

Both appellants Calhoun and Fields then rested their cases.

III. Summation and Instructions

During the course of summations, the Government stated to the jury:

"One more point. His Honor will undoubtedly instruct you that you are not to reach your verdict on the basis of how many witnesses have been presented to you in the course of the trial. The government has put on a great many more. That is not decisive in this case.

But what would be decisive is the fact that certain individuals whom the defendants named in their testimony, who could shed a whole lot of light on this case and perhaps vindicate the witness, are not here.

Calhoun told you that he was standing and that his two friends came to him and they were talking together from about seven-thirty or eight o'clock

p.m. and that the bus took off and at that point Calhoun started walking up Georgia Avenue and two minutes later was arrested while walking on the street.

Now why didn't they come here, ladies and gentlemen? I think the only reasonable inference is that they would not support this testimony.

The same is true of Fields in a slightly different matter. The person also present has seen him around the street, around 14th Street any number of times. He would see him once a week or so on the average. Now if Michael were here, if the testimony of Fields were true Michael could corroborate that testimony.

If the testimony of Mrs. Ward is true of course it would be unreasonable to expect Michael to be here because he could not expect it, neither you nor I nor defense could expect a man such as Michael to get up there on the stand and admit if he has taken part in a crime of this kind.

But if Field's testimony is true, that he and Michael were just standing to one side while all of this other gang of boys committed a rape on Miss Johnson, then it seems only logical that Fields would have Michael here to support his testimony. Because under those circumstances Michael would be just as innocent as Fields, assuming his testimony is to be believed. Michael is not here and you can draw your own conclusions, ladies and gentlemen. (Tr. III 112-114).

* * * *

(During Rebuttal)

All of these circumstances that you have heard about, ladies and gentlemen, from that witness stand in the last two and a half days, the fact that there are no other witnesses at the present to support the testimony of the two defendants, the alibi witnesses that Calhoun would or could have easily brought in, his two friends whom he put on the bus, the witness Michael if indeed there is a Michael,—and Michael may or may not be his real name—who could have testified for Fields in support of Fields' story.

Mr. Timberlake has suggested that Fields could have found him because he has been in jail most of the time.

Ladies and gentlemen, Fields was out on bond during at least part of the pendency of this case and it would seem reasonable to me, and I am sure it would be reasonable to you also, one of the first persons he would have gone looking for when he got out on bond was Michael. He knew where to find him; he hung around 14th Street.

Fields has told you he used to see Michael every week or so. I am sure he could have found him at that time or at least have found some trace of him. (Tr. III 142, 143).

Counsel for appellant Calhoun argued:

But the government admitted that there was a third boy who was identified by the complaining witness. Where is he? Where is he? They know where he is. They arrested him. She identified him. Do you not think, do you not think that he should be here? He was identified, he was there, and the government of this community arrested him. (Tr. III 121).

The Court instructed the jury in part as follows:

Also in this particular case the question has come up on absent witnesses, and the Court instructs you that if a witness is not produced who is peculiarly available to one side or the other, then the jury has a right, if it wishes to do so, and it is entirely within the jury's discretion to draw the inference that the testimony of that particular witness would be unfavorable to the party who has failed to call that particular witness unless the absence of the witness is sufficiently explained to you or to your satisfaction. (Tr. III 152).¹²

¹² At the close of all instructions, the following colloquy occurred at the bench:

MR. McARDLE: Your Honor, I was particularly concerned and I am not making an objection but I would like to discuss this with you and the other attorneys on the availability

The jury returned a verdict of guilty on all counts against both appellants Calhoun and Fields. From those decisions, they now appeal.

STATUTES INVOLVED

Title 22 District of Columbia Code § 105 provides:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

of witnesses. That instruction bothered me in preparation of this suit. Because as I remembered the instruction the witness has to be peculiarly available to only one party.

THE COURT: That is what I said.

MR. McARDLE: I know you said that. But I am not sure, Your Honor, and I wanted the record to note that I am not objecting because you have the instruction right. But I am not sure that the evidence supports that instruction because I am not sure that there is any evidence to show that any of these witnesses were peculiarly available.

MR. TERRY: I think the jury would first make a preliminary finding that the witness is available to one side.

THE COURT: You strongly argued the point, what good is it to have two witnesses at one-thirty—

MR. McARDLE: Yes, that is right. This surprised me when Mr. Terry mentioned it in his closing. Because in the preparation of this case I could not bring myself to believe that any witness was peculiarly available to any one party.

Do you see what I mean?

In my summation I mentioned this Mr. Brown. Well I tried to find him, but I could not come to this Court and say that he was peculiarly available to only the government.

THE COURT: Do you have anything else?

MR. McARDLE: No, no, your Honor.

THE COURT: Do you have anything?

MR. TIMBERLAKE: No.

THE COURT: The Court will not change it. We will let it stand as it is.

MR. McARDLE: All right, then (Tr. III 168-170).

Title 22 District of Columbia Code § 2801 provides in part:

Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years. . .

Title 22 District of Columbia Code § 3502 provides in part:

Every person who shall be convicted of taking into his or her mouth or anus the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth or anus of any other person or animal, or who shall be convicted of having carnal copulation in an opening of the body except sexual parts with another person, shall be fined not more than \$1,000 or be imprisoned for a period not exceeding ten years. . .

SUMMARY OF ARGUMENT

I

Having interposed no objection below, appellants are precluded for the first time on appeal from objecting to the prosecutor's summation and the trial court's instruction relating to the issue of absent witnesses. In any event, their substantive contentions are without merit. It is within the province of the jury, upon assessment of a calculus of factors, to determine both the availability of an absent witness to one party and the satisfactoriness of that party's explanation for failure to produce the absent witness. In the present case, ample evidentiary predicate existed to allow the inference that both appellants could have made the minimal contacts with their missing corroborative witnesses necessary to produce them at trial. Both appellants testified that they were friendly with their corroborative witnesses and reasonably familiar with their habits. Appellant Fields saw his missing corroborative witness, Mack, about once a week and knew individuals who might know his exact whereabouts. He

was sufficiently well acquainted with him to refer to him with the appellation "brother" and spend several hours with Mack engaging in a sequence of bizarre social encounters. Appellant Calhoun knew his corroborative witnesses by their full surnames. He indicated that he had known them socially for several years. We think it manifest that sufficient evidence existed to show both appellants were possessed of the power to produce their corroborative witnesses at trial. Further, we think the jury could, in assessing appellants' naked denials of knowledge of the whereabouts of these witnesses, properly conclude that such explanations were insufficient to explain the witnesses absence and that notwithstanding such lack of information, appellants by their own testimony were possessed of sufficient other information that they still might have produced the missing corroborative witnesses.

In any event, neither the prosecutor's summation nor the court's charge on absent witnesses seriously prejudiced appellants. The summation treated but tangentially the absent witness issue. Counsel for appellant Calhoun himself made a missing witness argument concerning the Government's failure to produce a third unnamed individual arrested at the scene. The trial court's instructions admonished the jury to consider that it was for it alone to determine what weight to give to the testimony at trial. In its discretion, the court gave a succinct and neutral missing witness instruction, one sentence in length, in an attempt to structure in a neutral and orderly way the factual prerequisites to the exercise of inferences as to testimony an absent witness might offer. Assuming appellants can now for the first time object to the summation and instruction as they related to absent witnesses and assuming some quantum of harm was caused them, in view of the strength of the Government's case, appellant Calhoun's own use of the missing witness argument, and the trial court's efforts to place the issue in proper perspective through a succinct instruction neutral in term, any prejudice suffered by appellants hardly warrants reversal.

II

The evidence of identification of appellant Calhoun was sufficient to sustain the jury verdict of guilty on all counts. The prosecutrix unhesitatingly and with no equivocation whatsoever identified appellant Calhoun at trial as one of the individuals who had attacked her. She testified that she saw and remembered his clothing, which she also identified, and that his face stuck in her mind. Further, she described him and then identified appellant Calhoun as one of her attackers directly after the attacks in custody of the police on the Raymond Playground. In the absence of any motive raised by appellants for falsification, we suggest her identification to be so convincing that substantial further corroboration is unnecessary.

In any event, that corroboration exists. Appellant Calhoun was seen by two police officers in the near vicinity of the attacks directly after their having been committed. He was running, perspiring heavily and out of breath. His knees were grass stained. Appellant Calhoun conformed to a description of the leader of the gang attacking the prosecutrix given by her directly after these attacks occurred. The arresting officer testified that the prosecutrix identification of appellant Calhoun was clear and spontaneous. Appellant Calhoun's trousers were thereafter found to have semen stains. This extrinsic evidence corroborating the prosecutrix' in-court and on-the-scene identifications of appellant Calhoun is surely of great force and constitutes "circumstances in proof which tend to support the prosecutrix's story."

III

Appellants remaining evidentiary arguments do not require consideration since they in no way affect the length of sentence of either appellant. In any event, they are meritless. The evidence of their commission of the acts of sodomy on the prosecutrix was ample and corroborated. Mrs. Ward testified explicitly that both appellants had put their "privates in her mouth". The testimony was

clear at trial, and appellants apparently concede, that Mrs. Ward was brutally raped on the night in question. Her ripped clothing, the photographs of the scratches and bruises on her body and the screams heard by nearby dwellers vividly indicate the manner of the attacks which she endured. Her roommate, Esther Perry, corroborated her account of the ruse perpetrated by appellant Fields which eventually lured Mrs. Ward onto the Raymond Playground. Mrs. Ward's condition upon the arrival of the police—nude, crying, and very upset—lends further credence to her description of the harrowing events she had been forced to undergo.

The record fails to reveal any possible motive for her falsification of testimony concerning the sodomy attacks. In these circumstances, we submit the "circumstances in proof which tend to support [Mrs. Ward's] story" are decidedly sufficient to corroborate her account of the attacks made on her.

Appellants' attack on the evidence in support of their convictions as aiders and abettors borders on the frivolous. Each was a part of the group which Mrs. Ward testified prevented her escape by encircling her and then after she had attempted to run ripped all her clothes off leaving her naked and subject to further sexual attacks which each appellant, among others, consummated. That no conversation nor sign of recognition passed between appellants is insufficient to withstand the overwhelming evidence of their impeding Mrs. Ward's escape and aiding in the commission of the criminal attacks which followed. Such is surely sufficient to make appellants culpable as aiders and abettors.

IV

Appellants are now precluded from objecting to the trial court's instructions, not having objected below. In any event, their contentions are without merit. The trial court properly presented the applicable rules of law as to each appellant, notwithstanding that, in the exercise of its discretion, it presented the applicable rules of law

jointly as to both appellants. Appellants point to a series of minor ambiguities in support of their contention otherwise. However, reading the court's instruction as a whole, we see no confusion in its charges. By them appellants surely suffered no plain error affecting substantial rights.

ARGUMENT

- I. Appellants are precluded for the first time on appeal from objecting to the prosecutor's summation and the court's instruction on the issue of absent witnesses. In any event, both the summation and the prosecutor's remarks were entirely proper and do not constitute plain error requiring reversal.

(Tr. III 49, 50, 63, 64, 76, 79, 98-101, 103-114, 121, 146, 147, 150, 152, 168-70; Tr. II 49, 50, 156; Tr. I 92)

A. *The Prosecutor's Summation*

Appellants here assert for the first time that prejudicial error necessitating reversal occurred in the prosecutor's summation to the jury. Subject to adverse verdicts below, appellants now object to statements in which the Government argued that their failure to produce individuals named by them as corroborative witnesses to their exculpatory defenses allowed the inference that those witnesses would not support appellants' testimony. Yet both counsel below, who showed themselves to be shrewd and able advocates throughout the course of a complicated four day trial, did not object to any of the Government's summations. Better able to view the trial situation, both counsel remained silent.¹³ Neither asked for remedial

¹³ Counsel for appellant Calhoun ultimately voiced his concern for the giving of a missing witness instruction in a colloquy at the bench upon the close of the court's instructions (Tr. III 168-70). At no time, however, did he object to the argument on this issue by the Government in summation. Indeed, as we later point out counsel for appellant Calhoun himself engaged in this kind of argument

instructions. In these circumstances it is well settled that "counsel for the defense cannot as a rule remain silent, interpose no objection and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial". *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940). Accordingly, appellate tribunals ordinarily refuse to entertain challenges to the propriety of a summation raised for the first time on appeal. *Karikas v. United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961); *Accardo v. United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957). As appellants' counsel were not sufficiently alarmed by the nature of the Government's summation to utilize the normal corrective remedies at trial, we think appellants should not be allowed "two bites at the cherry"¹⁴ and should be precluded from here raising their objections.

Assuming *arguendo* that appellants can properly raise this issue at this late date, we submit that no error occurred in the Government's summation. It has long been settled that a party's failure to utilize a witness peculiarly within his control and whose testimony would elucidate the events in question permits an inference that the testimony would have been unfavorable. *Walter Wynn, Jr. v. United States* and cases cited therein, D.C. Cir. No. 20,723, decided November 16, 1967, slip. op. at 6. Appellants do not contest this nor do they contest that the corroborative witnesses referred to throughout trial by them as "Mack",¹⁵ "Robert McCandless" and "Cain Cooper" could have elucidated the events in question—the validity of appellants' alibi defenses. The nub of appellants' position is rather that by virtue of their claims

with regard to a third individual arrested as one of the attackers and not put on by the Government (Tr. III 121). At the bench conference following instructions counsel for appellant Calhoun conceded that he "strongly argued the point" (Tr. III 169).

¹⁴ *Dichner v. United States*, 384 F.2d 167, 168 (1st Cir. 1965).

¹⁵ This individual is also referred to throughout the trial as "Mackie", "Michael" or "Mike" (Tr. II 156, III 63, 64).

that they knew not where to contact the above named corroborative witnesses, no evidence existed to show that the alibi witnesses were within appellants' powers to produce. Hence, the argument runs, because of this "satisfactory reason" for non-production, they avoided the onus of the adverse missing witness inference and their subjection thereto was prejudicial error (App. Br. 13, 14).

We think it clear, however, that it is ultimately within the province of the jury to determine upon analysis of a calculus of factors both the availability of an absent witness to one party and the satisfactoriness of that party's explanation for failure to produce the absent witness. *Morrison v. United States*, 124 U.S. App. D.C. 330, 333, 365 F.2d 521, 524 (1966).¹⁶ In assessing the ability to produce a missing witness, the jury can properly take into account the relationship between a defendant and the missing witness,¹⁷ the ease and frequency of their prior meetings,¹⁸ and the defendant's knowledge of the missing

¹⁶ We think this situation is very much analogous to that involving so-called "informer" witnesses utilized by a defendant—individuals who testify on defendant's behalf that other named individuals and not defendant were the guilty parties. There, the jury can properly receive the testimony of such witnesses with suspicion and act upon it with caution, provided the jury makes certain prerequisite findings. It must find that the witness is indeed an informer and that his contingent interest in the possible future conviction of others for the crimes charged against a defendant is not too remote to constitute an interest in the outcome of the trial. *Winston and Hawkins v. United States*, D.C. Cir. No. 21,108, decided March 21, 1968 per curiam. Having found the factual prerequisite, the jury may then draw adverse inferences as to the credibility of the informer-witness. So here, the jury having made the necessary prerequisite factual determinations, it may then draw inferences as to the testimony a missing witness might have given.

¹⁷ See e.g. *Milton v. United States*, 71 App. D.C. 394, 397, 110 F.2d 556, 559 (1940); 2 Wigmore, Evidence 86 at 166 (3rd ed. 1940). McCormick, Evidence § 248 (1954) at 534 n.8 (cases on relationship).

¹⁸ *McAbee v. United States*, 111 U.S. App. D.C. 74, 76-77, 294 F.2d 703 (1961).

witness' surname and residence.¹⁹ Assuming requisite ease of production is found the jury then may assess the reasonableness of a defendant's explanation for failure to produce, weighing his explanation in light of ordinary experience.²⁰ We submit that the record demonstrates ample evidence from which the jury could properly have determined appellants' corroborative witnesses to be available to them for testimony at trial.

Appellant Fields' absent witness, Mack

Appellant Fields testified that he never engaged in sexual intercourse or sodomy with the victim, Mrs. Theresa Johnson Ward. He denied participating in a ruse to entice her to the Raymond Playground.²¹ By his own testimony, his companion throughout the entire episode as he related it was "Mack". Appellant Fields indicated that he saw Mack once a week on 14th Street. He further testified that he knew certain individuals who might know Mack and his whereabouts (Tr. III 76, 79). Both the prosecutrix, Mrs. Ward, and her companion testified that appellant Fields identified Mack as his brother. (Tr. I 92, Tr. II 156.) Appellant Fields admitted this (Tr. III 63, 64) but indicated that he was rather merely "trying to help [Mack] along as far as the girls were concerned." Further, it was undisputed at trial that Mack was appellant's constant companion during the entire course of a lengthy and bizarre social encounter.

We think it abundantly clear that the jury could properly have inferred that appellant in the above circumstances was able to produce Mack as a witness at trial. Seeing him once a week on 14th Street, knowing

¹⁹ *Stevens v. United States*, 115 U.S. App. D.C. 332, 334, 319 F.2d 733, 735 (1963).

²⁰ See e.g. *State v. Clawans*, 183 A.2d 77, 81-82 (N.J. 1962).

²¹ The Government was totally unaware of the nature of appellant Fields' alibi defense and his reliance on Mack until the last morning of trial when he recited it from the stand. Directly thereafter, the defense rested and summations to the jury began.

other individuals who might know his whereabouts, sufficiently well acquainted with Mack to refer to him with the appellation "brother" and spend some several hours engaging in a bizarre set of events, appellant was surely in a position to make the necessary contacts with Mack to produce him as a witness at trial.

Mack did not testify at trial. Appellant's reason for not producing him was the naked assertion that he did not know Mack's last name nor did he know his address. We think it manifest that the jury in assessing the reasonableness of this explanation could properly conclude that it was insufficient and that ample opportunity nonetheless existed for appellant to contact Mack such that he could have Mack present at trial. Appellant Fields did not claim that he was incarcerated prior to trial and thereby incapacitated from making a minimal attempt to find Mack. His sole explanation was his claim to no knowledge of Mack's surname or home address. In the circumstances of this case we think it entirely within the province of the jury to regard this explanation as unsatisfactory to explain Mack's non-production and not sufficient to shield appellant Fields from reasonable inferences as to the testimony Mack would have offered.²²

²² Finally, we think this court might properly take judicial notice of the fact that appellant Fields while on bond in the present case was arrested in the company of one Arnold Mack on October 16, 1966, (Cr. 1343-66) for assault with intent to commit robbery, some three and one-half months after his arrest for the attacks on Mrs. Ward and several months *before* his trial thereon. We suggest this similarity in name to be more than mere coincidence and to be demonstrative of appellant's ability to contact Mack as a potential corroborative witness. Moreover, at his trial on the assault charges on April 10, 1967, barely three weeks after he denied knowledge of Mack's home address and full name in his trial in the present case, appellant Fields testified as to a knowledge of Mack's full name and indicated that on the night he was arrested, October 16, 1966, he had visited Mack's home (Tr. 49, 50).

Appellant Fields' conviction for assault with intent to rob is presently also before this court on review in D.C. Cir. No. 21,106.

*Appellant Calhoun's Missing Witnesses,
"Cain Cooper" and "Robert McCandless"*

It was appellant Calhoun's alibi that he was at 7th Street and Florida Avenue, N.W. at the time Mrs. Ward was being attacked on the Raymond Playground. He indicated that one "Cain Cooper" and one "Robert McCandless" were there with him (Tr. III 49, 50). Appellant testified that these corroborative witnesses were "friends" (Tr. III 50), and that he had known them "socially" for between one and three years (Tr. III 50). He indicated that when Cooper and McCandless left him, they boarded a Georgia Avenue bus (Tr. III 49).

In these circumstances, we think the jury could properly have concluded that appellant Calhoun was able to produce McCandless and Cooper as witnesses at trial. Having known them as "friends" for a substantial length of time, associating with them "socially" and knowing their full names including surname, appellant was surely able to make the necessary minimal contacts to produce them at trial to testify as to his alibi defense.

Neither McCandless nor Cooper testified at trial. As appellant Fields, appellant Calhoun explained their absence with a naked denial of any knowledge as to their home addresses or whereabouts. Again we think it clear that the jury, in weighing the adequacy of this explanation, could properly conclude that appellant Calhoun by his own testimony was possessed of enough information and was on sufficiently close terms with the missing witnesses such that he could produce them at trial, notwithstanding his lack of knowledge as to their residences. Having so decided, the jury could properly draw reasonable inferences as to the testimony McCandless and Cooper would have offered.

We submit that the evidence of availability of the missing corroborative witnesses to both appellants is strong. Moreover, we think it telling on appeal at least against appellant Calhoun that his counsel at trial—better able to view the evidence as it developed—was of the same view. At the bench following the court's instructions,

counsel for appellant Calhoun implicitly conceded that the absent corroborative witnesses were clearly available to appellants (Tr. III 169). The thrust of his contention was rather the claim that they were not *peculiarly* available to appellants alone (Tr. III 169). Surely this assessment should now weigh heavily. The requisite evidentiary foundation existing as to both appellants Fields and Calhoun, the prosecutor could properly comment on the failure of the missing corroborative witnesses to appear on appellants' behalf.

In any event, the prosecutor's comments did not substantially prejudice appellants, a prerequisite to reversal. *Cross v. United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). Appellants must show that the erroneous comment by the prosecutor rendered substantial the possibility that the jury's judgment was substantially swayed by the comment and that it thus was deterred from a fair consideration of appellants' guilt or innocence. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *Cf. Pennewell v. United States*, 122 U.S. App. D.C. 332, 353 F.2d 870 (1965). During summation, the prosecutor stressed at length the positive aspects of the Government's case, including the testimony and identifications of the prosecutrix Mrs. Theresa Johnson Ward (Tr. III 98-101). He emphasized the corroboration of the fact of the attacks and the identity of appellants Fields and Calhoun as two of the attackers (Tr. III 103-111). He stressed the credibility of the victim (Tr. III 111-112). The prosecutor's treatment of the missing witness inference came near the end of his summation and was rather circumspect (Tr. III 113-114). Immediately prior thereto, the prosecutor cautioned the jury not to view as determinative the number of witnesses put on by one side as opposed to the number put on by the other: "His honor will undoubtedly instruct you that you are not to reach your verdict on the basis of how many witnesses have been presented to you in the course of the trial. The government has put on a great many more.

That is not decisive in this case." (Tr. III 112-113.) As to appellant Fields' missing witness, Mack, the prosecutor did not urge the jury to infer his testimony to be adverse to appellant but instead merely indicated, "... you can draw your own conclusions, ladies and gentlemen." (Tr. III 114.)

Counsel for appellant Calhoun during his rebuttal offered the same kind of missing witness argument with regard to a third unnamed suspect arrested as one of the attackers: "But the Government admitted there was a third boy who was identified by the complaining witness. Where is he? They know where he is. They arrested him. She identified him. Do you not think, do you not think he should be here? He was identified, he was there, and the government of this community arrested him." (Tr. III 121.) In view of appellant Calhoun's own utilization of this kind of argument in circumstances less productive of the inferences he sought to have the jury draw,²³ we think he can now hardly be heard to claim prejudice.

²³ The identity and whereabouts of the third individual arrested on the evening of May 31, 1966 as one of the attackers was never brought out at trial. There was no evidence whatsoever of the Government's ability to produce this individual. A *fortiori* nothing in the record showed the witness to be *peculiarly* available to the Government. Indeed, after making the missing witness argument as to this third individual (Tr. III 121) counsel for appellant Calhoun at the bench indicated to the Court that he "could not come to this Court and say that he [the third unnamed suspect] was peculiarly available to only the government" (Tr. III 169). Nor was there any evidence of this individual's ability to elucidate the events at issue.

Faced with these arguments, the trial court forcefully instructed the jury, "you are still the sole judges of all of the questions of fact. Now you determine those question (sic) of fact solely from the evidence that has been submitted from the witness stand, from any exhibits that are introduced into evidence." (Tr. III 146). It indicated that it was for the jury alone "to say what weight [it] will give to the testimony of any witness who may have testified during the progress of the trial" (Tr. III 150) and further that it was their recollection, not the recollection of the several counsel, that controlled (Tr. III 147). Without unduly emphasizing the issue, and carefully avoiding any specific reference to any of the witnesses not produced by either side, the court below instructed the jury that "if a witness is not produced who is peculiarly available to one side or the other, then the jury has a right, if it wishes to do so, and it is entirely within the jury's discretion to draw the inference that the testimony of the particular witness would be unfavorable to the party who has failed to call that particular witness unless the absence of the witness is sufficiently explained to you or to your satisfaction" (Tr. III 152).²⁴ Together with the other admonitions given by the trial court, this instruction fairly put the issue of the missing witness inference without undue stress on the tangential references thereto in the Government's summation, nor indeed without undue emphasis on ap-

²⁴ We are aware that appellant also challenges the propriety of the missing witness instruction in the circumstances of this case (App. Br. at 13, 14). We deal with that challenge in our next argument. Briefly, however, we think it clear from both the evidence at trial and the arguments of both the prosecutor and counsel for appellants Calhoun and Fields that such an instruction was warranted. Far from prejudicial, we think that instruction rather clarified to the jury its prerogatives as to the inferences it might draw as to the testimony of the witnesses referred to by both sides in closing argument as being missing. We fail to see where such clarification applying equally *both* to the prosecution and defense can now be called prejudicial. We think it rather an appropriate explanatory endeavor.

pellant Calhoun's own hazy attempts to use the inference against the Government.

This was not a "paper-thin" case. The evidence against both appellants was strong. The fact of the attacks and appellants' own participation therein were documented by the testimony of the victim, Mrs. Theresa Johnson Ward, and a stream of other witnesses. In the face of this evidence, appellant's presented only their naked denials of participation. Assuming appellants can now for the first time object to the missing witness reference by the prosecutor in his summation and assuming that reference caused them some quantum of prejudice, in view of the strength of the Government's case, appellant Calhoun's own use of the tactic to which he now objects, and the efforts of the trial court to place the missing witness issue in proper perspective, the prejudice suffered by appellants hardly warrants reversal. *Cf. Cross v. United States, supra* at 283.

B. The Trial Court's Instructions

Appellants here for the first time contend the instruction of the trial court on the issue of absent witnesses to be so prejudicial as to require reversal. At trial, at the close of the court's instructions counsel for appellant Calhoun after himself making a strong absent witness argument against the Government (See 19, *supra*) and without raising an objection indicated to the court his uncertainty at the propriety of that to the absent witness instruction in the circumstances of this case (Tr. III 168-170).²⁵ Counsel for appellant Fields raised no

²⁵ As we indicated, the reason for defense counsel's concern was the peculiarity issue—that there was insufficient evidence to show the absent witnesses to be *peculiarly* available to appellants *alone*. At no time did he ever raise, and indeed we think he conceded, the proposition now raised on appeal by appellants—that there was insufficient evidence to show the absent witnesses availability to appellants for testimony at trial (Tr. III 168-170).

objection whatsoever. We take it that the doubts expressed by counsel for appellant Calhoun do not rise to the character of an objection, particularly when viewed in light of his outright eschewing of that tactic: "... I am not making an objection . . ." (Tr. III 168).

Accordingly, neither appellant having objected to the giving of nor the wording of the instruction on missing witnesses, it is well settled that they are foreclosed absent a showing of plain error from attacking that instruction on appeal. Fed. R. Crim. P. 30. *Kelley v. United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Rivera v. United States*, 124 U.S. App. D.C. 99, 361 F.2d 553, cert. denied, 385 U.S. 938 (1966); *Williams v. United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, cert. denied, 375 U.S. 898 (1963); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). We think such foreclosure is particularly appropriate here where counsel for appellant Calhoun by his own closing argument on the Government's failure to produce a certain suspect, was himself partly responsible²⁶ for triggering trial court's instruction on the absent witness issue.

In any event, we think appellants' contention is incorrect on its merits. Appellants claim prejudicial error in the trial court's giving of a general absent witness instruction in the circumstances of this case (App. Br. 13, 14). The instruction, the wording of which appellants do not contest, is as follows:

"Also in this particular case the question has come up on absent witnesses, and the Court instructs you

²⁶ Lest appellant Calhoun be heard to claim that such argument was merely responsive to the Government's improper injection of that issue into the case by its own summation, we think it clear that if appellant Calhoun viewed the Government's closing argument on the subject of missing witnesses to be improper his appropriate remedy was to interpose an objection. That he did not so object, but rather restored to his own missing witness argument is an indication that he viewed the problem as purely a tactical one and not as one involving impropriety on the part of the Government.

that if a witness is not produced who is peculiarly available to one side or the other, then the jury has a right, if it wishes to do so, and it is entirely within the jury's discretion to draw the inference that the testimony of that particular witness would be unfavorable to the party who has failed to call that particular witness unless the absence of the witness is sufficiently explained to you or to your satisfaction". (Tr. III 152).

Appellants here raise the same argument as that made against the prosecutor's summation—that insufficient evidence existed to support the inference to that their absent corroborative witnesses were available to them to testify. Hence, they claim, an instruction allowing the jury to draw such inference was error (App. Br. 13, 14).

The trial court's instruction on absent witnesses came at the close of a four day trial during which that issue, although treated tangentially, nonetheless snaked its way through much of the proceedings. Certain individuals—named and unnamed—were referred to both by prosecution and defense witnesses as present during their versions of the events in question. The victim, Theresa Johnson Ward, after describing the attacks made on her by appellants Calhoun and Fields and the circumstances of her identification of them later on the Raymond Playground testified that she had also identified a third individual as one of her attackers during this period and that this individual was also arrested (Tr. I 51-62). Officer Wright also testified to the identification and arrest of a third unnamed individual (Tr. II. 218, 221). Appellant Calhoun in denying his presence at the scene of the crime and participation in the attacks testified that he instead was in the company of two named friends at 7th Street and Florida Avenue, N.W. (Tr. III 48-50). Appellant Fields testified that he was present during the time Mrs. Ward was being attacked but that he himself did not take part.

During the events as he described them, he indicated that he was accompanied by a named friend (Tr. III 58-60, 69-71).

None of these witnesses to the events at issue—those named by appellants and that referred to by the victim and Officer Wright—testified at trial. Having testified to substantial contacts with their corroborative witnesses, appellants explained their absence by a lack of knowledge as to the witnesses addresses and whereabouts (Tr. III 48-50, 64, 76). The failure of the Government to produce the third suspect arrested on the night of the attack went unexplained. Counsel for appellant Calhoun and the prosecutor employed the absent missing witness argument as minor parts of their summations (Tr. III 112-114, 121). Neither side raised any objection to this form of argument nor were any remedial instructions requested.²⁷

We think it clear that these circumstances amply justified the trial court's decision, in the broad exercise of its discretion,²⁸ to give a general absent witness instruction. Carefully tailored to meet the demands of this case, the instruction was complete and succinct, not giving any great emphasis to what had been a tangential issue at best. The instruction was one sentence in length. It was given in neutral terms, without specific reference to any of the witnesses not produced by either side.²⁹ It applied with equal force to both. Furthermore, the absent witness instruction clarified to the jury prerogatives which in the circumstances of this case the jury was likely to have exercised in any event—drawing inferences

²⁷ Neither the Government nor defense counsel requested the absent witness instruction.

²⁸ It is well settled that the trial court has broad discretion in instructing the jury. *Shettel v. United States*, 72 U.S. App. D.C. 250, 113 F.2d 34 (1940); *Harris v. United States*, 367 F.2d 633 (1st Cir. 1966), cert. denied, 386 U.S. 915; *United States v. Meisch*, 370 F.2d 768 (3rd Cir. 1966).

²⁹ Compare *Billeci v. United States*, 87 U.S. App. D.C. 274, 278-79, 184 F.2d 394, 398-99 (1950).

from the testimony at trial as to the testimony which absent witnesses for either side might have offered. That the trial judge, in his discretion, structured in a neutral and orderly way the necessary factual prerequisites to the exercise of such prerogative instead of allowing the jury a free hand at speculation can hardly be called erroneous and an abuse of discretion.

Appellant's contention that an insufficient factual predicate existed to call forth the absent witness instruction is incorrect; it suffers from the same infirmities of analysis detailed previously with regard to appellant's objection to the prosecutor's summation (*supra*, 27-31). Both appellants testified that they were friendly with their corroborative witnesses and reasonably familiar with their habits. Appellant Fields saw his corroborative witness, Mack, about once a week and knew individuals who might know his exact whereabouts. He was sufficiently well acquainted with Mack to refer to him with the appellation "brother" and spend several hours with him engaging in a sequence of bizarre social encounters. Appellant Calhoun knew his corroborative witnesses by their full surnames. He testified that he had known them "socially" for several years and knew them as "friends". We think it manifest that sufficient evidence existed to show that both appellants were able to make minimal contacts with these individuals to produce them at trial.³⁰ Further, we think the jury could, in assessing appellants' naked denials of knowledge of whereabouts of these witnesses, properly conclude that such explanations were insufficient to explain the witnesses' absence; and that notwithstanding such lack of information,³¹ appellants by their own testimony were

³⁰ See *Milton v. United States*, *supra* at 397; *McAbee v. United States*, *supra* at 76-77; *Stevens v. United States*, *supra* at 334.

³¹ Appellants make much of the fact that they denied knowing how to contact their corroborative witnesses. We reiterate that such conclusory denials are of no consequence. The determination of a defendant's ability to contact his corroborative witnesses is solely the jury's and rests on their analysis of a calculus of factors

possessed of sufficient other information that they still might have produced the corroborative witnesses. Such assessment—viewed in conjunction with counsel for appellant Calhoun's own implicit concession therein³²—can hardly be called unwarranted.

Assuming *arguendo* that the giving of the absent witness instruction in the circumstances of this case be erroneous, we fail to see where it is so prejudicial as to require reversal. *Cf. Cross v. United States, supra* at 283. Short and without great emphasis, neutral in terms and applying to both sides with equal force, the instruction was preceded by admonishments from the trial court to the jury that it was "still the sole judges of all of the questions of fact" which were to be determined solely from the "evidence that has been submitted from the witness stand, from any exhibits that are introduced into evidence" (Tr. III 146). Counsel for appellant Calhoun, by his closing argument, was partly responsible for triggering the court's use of the absent witness instruction. Further, as we have previously detailed, this was not a "paper-thin" case. The evidence against both appellants was strong. The fact of the attacks and appellants' participation therein was established by substantial and credible evidence. In the face of that evidence, appellants' sole defense was their naked denial of participation. Assuming they can now for the first time object to the absent witness instruction and assuming that instruction caused them some quantum of prejudice, in view of the instructions neutrality of term, its succinctness, the trial court's preceding admonishments, appellant Calhoun's own partial responsibility for triggering

about which a defendant may properly testify—as, for example, his knowledge of the witnesses full surname, address, habits, possible mutual friends, the length and character of defendant's relationship with the witness, and the relationship during the events in question. Appellants, however, could not preempt the jury from a determination of these factors merely by assuming the issue and claiming that they did not know how to contact their corroborative witnesses.

³² See 31, *supra*.

the instruction, and the strength of the Government's substantive case, the prejudice suffered by appellants hardly warrants reversal.

II. The evidence of identification of appellant Calhoun was sufficient to sustain the jury verdict of guilty on all counts.

(Tr. I 53, 54, 59, 60, 61, 62, 81-82, 110, 111, 122, 123, 139, 140; Tr. II 191, 206, 216-221, 227, 228, 229, 230, 211, 232, 250, 252, 253)

Appellant Calhoun was found guilty on all counts. He now challenges the sufficiency of the evidence identifying him as one of the attackers.³³ On appeal, if the evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence adduced at trial. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton v. United States*, 79 U.S. App. D.C. 329, 147 F.2d 28, *cert. denied*, 324 U.S. 875 (1945).

The prosecutrix, Theresa Johnson Ward, testified that on the night in question a group of nine or ten boys came toward her from out of the shadows on the Raymond Playground. At trial, she positively identified appellant Calhoun as one of them. She stated that he knocked her down and got on top of her, threatening to let his companions "get" her if she did not do what he wished. His pants open, appellant Calhoun then proceeded to have intercourse with Mrs. Ward. After momentarily choking her to quiet her screams, he "put his privates in [her] mouth". (Tr. I 53, 54). Mrs. Ward saw appellant Calhoun's features clearly. She testified that his face stuck in her mind. She also saw and remembered his clothing. (Tr. I 110, 111). Mrs. Ward's identification of appel-

³³ Neither appellant challenges the sufficiency of the evidence indicating that Mrs. Ward had been forcibly raped.

lant as the individual committing these acts was clear and unhesitating throughout the trial with no equivocation whatsoever.

She further and without hesitation identified Government's Exhibit Number 6, a fishnet shirt, as the shirt appellant wore during his attacks (Tr. I 59, 60). Mrs. Ward testified that she identified appellant Calhoun as one of her attackers shortly after the attacks in custody of the police either on the Raymond Playground or at the stationhouse (Tr. I 61, 62). We suggest the victim's identifications of appellant Calhoun at trial and prior thereto on the Raymond Playground minutes after the attacks, in conjunction with a description of appellant Calhoun given by her to the police on the Raymond Playground directly preceding this first identification, to be so consistent and so convincing as to be without need of further corroboration.³⁴ *Walker v. United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955); Cf. *Franklin v. United States*, 117 U.S. App. D.C. 331, 335, 330 F.2d 205, 209 (1964).³⁵

³⁴ Appellant Calhoun in his brief unfairly deprecates Mrs. Ward's testimony. He fails competely to acknowledge her clear in-court identification of him and of the shirt he wore during the attacks. The playground, which he characterizes only as "dark", was time and again indicated to be of sufficient illumination to allow the clear visualizing of features at distances up to ten or twenty feet (Tr. II 191, 206, 253). His inuendoes that the victim was of "doubtful character" (App. Br. 16) are unfounded.

³⁵ Appellant Calhoun's attempt to liken this case to *Franklin v. United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) (where the prosecutrix did not see her assailant during the crime and hence strong corroboration of identification was required) is misguided. We think it clear that Mrs. Ward had an ample opportunity to observe both his features and clothing, and remembered sufficient details to give the police a description of him. This plus her two subsequent unhesitating and spontaneous identifications of him surely make this case far different from the more tenuous identification by the prosecutrix in *Franklin*. In *Franklin* this court indicated that in certain circumstances, "... a convincing identification by the complaining witness based on adequate opportunity to observe need not be further corroborated". *Franklin v. United States*, *supra* at 235. In the present case there is not one, but two convincing identifications plus a description given the police directly

In any event, Mrs. Ward's identification of appellant Calhoun as one of the attackers was substantially corroborated. Officer Charles Wright testified that he responded to a radio call describing the attacks and proceeded immediately to the Raymond Playground area. He encountered appellant Calhoun running south on Georgia Avenue, out of breath and perspiring heavily. Officer Wright testified that he stopped appellant Calhoun who indicated that he had just come from a carry-out shop. Appellant Calhoun was unable, however, to tell Officer Wright where the shop was located. His attention diverged to two other youths on the street, Officer Wright told appellant to move along and himself went on to question them (Tr. II 216-221).

Officer Robert DeMilt testified that as he was responding to a radio transmission describing the attacks at approximately 2:25 A.M., he saw appellant running down the street some two blocks from the Raymond Playground. Officer DeMilt stopped appellant Calhoun who again stated that he had just been to a carry-out shop but was unable to remember its name. Officer DeMilt noticed that appellant Calhoun had grass stains on his knees. He was wearing a white fish-net shirt. Officer DeMilt apprised appellant of the rapes on the Raymond Playground and transported him back there. (Tr. II 227, 228, 229, 252).

On arriving back there at approximately 2:30 A.M., Officer DeMilt parked his car about 200 feet from the police car in which Mrs. Ward was then sitting. Leaving appellant in the squad car with his partner, Officer DeMilt proceeded to the car in which Mrs. Ward was sit-

after the attacks—all made after an ample opportunity during the attack to observe appellant Calhoun. No danger of falsification was shown to have existed. Neither appellant attempted to show any improper motive for the victim's charges, either conscious or psychopathic. Her story was entirely credible and internally coherent and was corroborated in other material respects. The sole detracting factor in her testimony, which we submit does not reflect adversely on her truth-telling propensity, was her admission that she had recently undergone treatment for venereal disease (Tr. I 81-82).

ting and there received from her a description of the individuals involved in the attacks. Officer DeMilt testified that Mrs. Ward there indicated the ringleader to be a dark-skinned boy calling himself "John" and wearing a white fish-net shirt. Officer DeMilt testified that he then brought appellant Calhoun to the car where Mrs. Ward was sitting and she immediately exclaimed, "that is the ringleader", "he is the one who calls himself John" (Tr. II 227, 230, 231, 232, 250).

FBI examination of the pants worn by appellant Calhoun revealed seminal stains on the fly of his pants and grass stains on the knee areas. (Tr. I 122, 123, 139, 140). Testimony at trial was consistent that although the Playground area was dark and poorly illuminated, individual features could be distinguished at a reasonable distance (Tr. II 191, 206, 253).

We think it clear that the above testimony constitutes ample corroboration of Mrs. Ward's identification of appellant Calhoun as one of her attackers. Testimony of two police officers indicated appellant Calhoun to have been running from the area of the attacks moments after they occurred. Arrested some two blocks away from the Raymond Playground, appellant was breathing hard and perspiring heavily with grass stains on his knees.³⁶ Officer DeMilt's testimony indicated that appellant Calhoun conformed to a description of one of the attackers given by Mrs. Ward at the Raymond Playground,³⁷ and upon showing appellant Calhoun to Mrs. Ward, her identification of him was immediate and certain. Appellant's pants were thereafter found to have grass stains on the knees and semen stains on the fly area. This corrobora-

³⁶ Appellant's presence in the immediate area directly after the attacks is an important factor corroborating the victim's identification of him as one of the attackers. *Ewing v. United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943).

³⁷ This alone may be sufficient to constitute corroboration of identification. *Roberts v. United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960), *cert. denied*, 368 U.S. 863 (1961).

tion of the victim's identification of the accused goes far beyond that unsuccessfully challenged in the recent case of *George W. Thomas v. United States*, D.C. Cir. No. 20,287, decided May 4, 1967. There, the sole corroborating evidence of the prosecutrix' identification was evidence placing appellant near the scene of the crime within a few hours of the act.³⁸ The extrinsic evidence corroborating Mrs. Ward's identification of appellant Calhoun is surely of greater force and clearly constitutes "circumstances in proof which tend to support the prosecutrix' story". *Ewing v. United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943).

III. Appellants' remaining evidentiary arguments do not require consideration and in any event are without merit.

(Tr. I 49, 50, 51, 52, 53, 54, 55, 56, 57, 77, 96, 97; Tr. II 159, 160, 161; Tr. III 8, 10, 61, 62, 68, 69, 73, 74)

Appellants Calhoun and Fields challenge the sufficiency of the evidence on which rests their convictions as principals for the offense of sodomy and aiders and abettors for the offenses of sodomy and carnal knowledge.³⁹

³⁸ In *Thomas*, the crime also occurred on a playground. It took place sometime between about 8:30 p.m. and about 9:15 p.m. The owner of a nightclub one block away from the scene of the crime who had known appellant for five years testified that he saw appellant enter the club sometime between 8:00 p.m. on the night of the crime and about 2:00 a.m. on the following morning. Appellant's mother testified that he left home about 6:30 p.m. and stayed out until about 11:00 p.m., left again about 11:15 p.m. and returned for good about 11:30 or 11:45 p.m. This places appellant near the scene of the crime within a few hours of the act and was the sole corroborating evidence of the prosecutrix' identification of appellant.

³⁹ The indictment under which appellants were convicted on all counts is as follows:

FIRST COUNT:

On or about May 31, 1966, within the District of Columbia, Robert Calhoun, Jr., aided and abetted by the co-defendant

Resolution of these challenges will in no way alter the sentence to be served by either appellant. Appellant Fields, challenging his conviction on counts one, three, and four, does not contest the sufficiency of the evidence supporting his conviction as a principal for the offense of carnal knowledge, a conviction for which he received a sentence of four to twelve years. In each of the counts appellant Fields does contest, he was given a sentence concurrent with the four to twelve years in count two and of equal or lesser duration. Accordingly, even if appellant Fields were to prevail in his evidentiary challenges, he could in no way alter the length of his sentence. Similarly, appellant Calhoun's sentence will be unaffected by the resolution of his present attacks on the evidentiary support for his conviction under counts two, three and four. In the event his previous argument as to insufficient corroboration of identification is successful, all counts against him fall. In the event that it is unsuccessful, count one charging him as a principal for the offense of carnal knowledge remains in tact, even

Calvin D. Fields, had carnal knowledge of a female named Theresa Johnson, forcibly and against her will.

SECOND COUNT:

On or about May 31, 1966, within the District of Columbia, Calvin D. Fields, aided and abetted by the co-defendant Robert Calhoun, Jr., had carnal knowledge of a female named Theresa Johnson, forcibly and against her will. The Theresa Johnson referred to herein is the same female referred to in the first count of this indictment.

THIRD COUNT:

On or about May 31, 1966, within the District of Columbia, Robert Calhoun, Jr., aided and abetted by the co-defendant Calvin D. Fields, committed a certain unnatural and perverted sexual practice with Theresa Johnson.

FOURTH COUNT:

On or about May 31, 1966, within the District of Columbia, Calvin D. Fields, aided and abetted by the co-defendant Robert Calhoun, Jr., committed a certain unnatural and perverted sexual practice with Theresa Johnson. The Theresa Johnson referred to herein is the same female referred to in the third count of this indictment.

were he to prevail in his attacks on counts two, three and four; his ten year indeterminate sentence under the Federal Youth Correction Act—imposed concurrently on counts one through four—will thus remain unaltered.

In such circumstances, appellants' present evidentiary contentions in no way affecting their sentences to be served, these contentions do not require consideration. *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943); *Fabianich v. United States*, 112 U.S. App. D.C. 319, 302 F.2d 904, *cert. denied*, 371 U.S. 816 (1962); *Gibson v. United States*, 106 U.S. App. D.C. 10, 13, 268 F.2d 586, 589 (1959); *Robinson v. United States*, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 32 (1954). *Cf. Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *Kosmos v. United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961).

Notwithstanding this bar, appellants' substantive contentions are meritless. The evidence of their commission of the acts of sodomy on Mrs. Ward⁴⁰ was ample and corroborated.⁴¹ Mrs. Ward testified that after appellant Calhoun had knocked her down and forcibly had intercourse with her, she was dragged to a nearby picnic table where appellant Calhoun "put his privates in [her] mouth" (Tr. I 53, 54). At this time she was nude, all of her clothing having been ripped off during an abortive escape attempt (Tr. I 53, 54). Mrs. Ward then testified that while under the picnic table, appellant Fields had

⁴⁰ Appellants in this argument (App. Br. 17, 18) direct themselves solely to corroboration of the *corpus delecti* of the sodomy. Appellant Calhoun's blanket challenge to the corroboration of his identification in each of the four counts for which he was convicted is treated in the preceding argument. Appellant Fields makes no corroboration of identification argument whatsoever.

⁴¹ In reviewing the sufficiency of the Government's evidence, this Court "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom". *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford v. United States*, — U.S. App. D.C. —, 375 F.2d 332 (1967).

intercourse with her "and then put his privates in [her] mouth" (Tr. I 53, 54).

"The need for corroboration depends on the danger of falsification". *Thomas v. United States*, *supra*, slip op. at 3.⁴² In the present case, we are unable to perceive any such danger. Appellants indicate only that "the brief statement that she [Mrs. Ward] made concerning the sodomy could have been added out of hatred or revenge for what she felt had been done to her by a group of boys who suddenly appeared out of the darkness" (App. Br. at 18). At trial, however, appellants made no attempt to show any improper motive for the charge of sodomy as would indicate revenge or any other such reason to stand behind Mrs. Ward's testimony. Indeed, the record fails to reveal the slightest evidence in support of this rank speculation. Appellants cannot now magnify it to constitute a "danger of falsification". Compare *Dunn v. State*, 127 Tenn. 267, 281, 154 S.W. 969, 972 (1913). Mrs. Ward's consent to any of the sodomy attacks was never at issue. Compare, *Farrar v. United States*, 107 U.S. App. D.C. 204, 275 F.2d 868 (1959). Appellants again failed to pursue and the record runs directly counter to any theory that Mrs. Ward might have been a psychopathic fabricator of the sodomy allegation. See, *Psychiatric Aid in Evaluating the Credibility of a Prosecuting Witness Charging Rape*, 26 Ind. L.J. 98 (and cases cited therein at 101, n.10). In these circumstances, the record below totally barren of the slightest indication that Mrs. Ward might have falsified her testimony as to the *corpus delecti* of the sodomy, we think this testimony is without need of substantial corroboration.

⁴² *Thomas* as well as other cases we rely on in making our corroboration argument involve corroboration of the *corpus delecti* of carnal knowledge, not sodomy. However, insofar as the cases discuss the rationale of the corroboration rule and the requirements for sufficient corroboration, we think the cases are clearly relevant to sodomy situations as well. Particularly is this true in the present case where both carnal knowledge and sodomy offenses were a part of the same criminal scheme.

In any event, Mrs. Ward's testimony as to the unnatural acts committed on her was substantially corroborated by "circumstances in proof which tend to support the prosecutrix' story". *Ewing v. United States, supra*. The evidence supporting her description of the gang rape was overwhelming, and appellants indeed conceded at trial as they apparently do on appeal that Mrs. Ward was brutally raped by a number of individuals on the Raymond Playground on the night in question. Dr. Cuomo, having examined her directly after the attacks, testified to the presence of intact sperm in her cervix, indicating recent intercourse (Tr. III 8, 10). The victim's ripped clothing, the photographs of the scratches on her back, and the screams heard by St. Elmo Smith and his son Timothy coming from the playground at the time of the attacks vividly indicate the manner in which the attackers forced themselves on Mrs. Ward. Indeed, appellant Fields at trial corroborated the *corpus delecti* of the rapes testifying that he watched as several boys raped Mrs. Ward (Tr. III 61, 62, 73, 74). Moreover, Mrs. Ward's companion earlier that evening, Esther Perry, corroborated her account of the ruse used to lure her to the Raymond Playground. Miss Perry testified that when the two girls returned with appellant Fields and Mack to the rooming house, appellant Fields "began acting funny and couldn't get his breath" (Tr. II 159). Ten or fifteen minutes later she looked out the window in her room when she saw Mrs. Ward and Mack leave the rooming house carrying appellant Fields on their shoulders (Tr. II 159, 160, 161).⁴³ Finally, Mrs. Ward's condition upon the arrival of the police—nude, crying, very upset—lends further credence to her description of the harrowing events she had just been forced to undergo. We suggest these "circumstances in proof which tend to

⁴³ We think Miss Perry's corroborative testimony concerning the asthma attack feigned by appellant Fields is especially noteworthy in view of appellant Fields' denials that he ever so acted or that he allowed himself to be helped home from the rooming house (Tr. III 68, 69).

support the prosecutrix' story" constitute ample corroboration of the *corpus delecti* of the sodomy as Mrs. Ward described it.

Appellants' attack on the sufficiency of the evidence supporting their convictions as aiders and abettors borders on the frivolous. We reiterate the long settled rule that on appeal if evidence is asserted to be insufficient, it must be reviewed in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and to draw justifiable inferences of fact from the evidence adduced at trial. *Glasser v. United States, supra* at 80. It is not necessary that the evidence rule out every reasonable hypothesis but that of guilt. On the contrary, where there are divergent hypotheses, one of guilt and one of innocence, and there is evidence to support either, then the jury must be given an opportunity to choose between them. *Curley v. United States, supra*.

On these standards, the evidence of appellants' participation in the offenses of sodomy and carnal knowledge committed as aiders and abettors against Mrs. Ward was decidedly sufficient. Appellant Fields, having arrived at the Raymond Playground on the shoulders of Mack and Mrs. Ward, indicated that he needed some water for his asthma. Then, unsupported and walking upright he went to the school building on the Playground, ostensibly for this purpose (Tr. I 49, 50, 77). Mack accompanied appellant Fields and returned shortly thereafter. Appellant Fields, however, did not return for some ten minutes. On finally coming back, he indicated that he was ill and needed to rest at a picnic table on the playground. (Tr. I. 49, 50, 77, 96, 97). The three of them—Mrs. Ward, appellant Fields and Mack—were alone near the picnic table for some moments. Then, from out of the shadows nine or ten boys surrounded them, led by appellant Calhoun. Appellant Calhoun forcibly had intercourse with Mrs. Ward (Tr. I 51, 52). As he was doing this (a period of over a minute), *appellant Fields, Michael, and the other boys were "all*

crowded around saying remarks" (Tr. I 53) (emphasis added). The group was distracted by the barking of some nearby dogs and Mrs. Ward stood up and tried to escape. All of the boys were still crowded around her. As she attempted to get away, one of them grabbed her and all of the boys started pulling her clothes off. (Tr. I 54). She was dragged to the picnic table where both appellants committed oral sodomy against her. Appellant Fields also had carnal knowledge of her under the picnic table (Tr. I 54, 55). A third unnamed individual also had carnal knowledge of her there (Tr. I 56). The entire group was eventually frightened off by some barking dogs and immediately thereafter the police arrived (Tr. I 57).

In order to be convicted as an aider and abettor it is necessary that an accused in some way associate himself with the criminal venture or participate in it as something he wishes to bring about, to seek by his action to make it succeed. *Nye & Nissen v. United States*, 336 F.2d 613 (1949); *Long v. United States*, 124 U.S. App. D.C. 14, 360 F.2d 829 (1966); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). An accused's mere presence at the scene of the crime is sufficient for culpability as an aider and abettor if it is intended to and does aid the primary actors. *Long v. United States, supra*.

Both appellants by their actions on the Raymond Playground in preventing Mrs. Ward's escape and then ripping off her clothing clearly associated themselves with and sought to bring about the brutal attacks committed against her. The prosecutrix was lured by a ruse to the Raymond Playground by appellant Fields, who on pretence of needing some water disappeared behind the school building for some ten minutes and on returning suggested a brief rest at a picnic table on the playground. Appellant Calhoun shortly thereafter appeared and consummated the initial attack on the prosecutrix. During the attack, appellant Fields and the other boys were crowded around the victim, making remarks. When she thereafter attempted to escape, she found herself still

encircled by the entire group—including appellants Calhoun and Fields. Having been grabbed by an unnamed individual as she tried to run, *all* of the boys—Calhoun and Fields among them—ripped off her clothes. She was then dragged to the picnic table (previously mentioned by appellant Fields to her as a “resting place”) where both appellants Calhoun and Fields committed unnatural acts against her and appellant Fields and an unnamed party raped her. Surely the evidence is clear and direct that both appellants actively impeded Mrs. Ward’s attempt to escape and aided in the commission of the criminal acts which followed, first by crowding around her and then by joining in denuding her. We suggest the inference is equally clear that appellant Fields, by his ruse and his extended journey behind the school followed immediately thereupon by the appearance of appellant Calhoun, acted to lure Mrs. Ward into an area where she might be attacked.

Appellants—totally disregarding the evidence of their preventing the victim’s escape and then denuding her—rely solely on the fact that no conversation occurred between them and no sign of recognition was passed between them to support their claim that they did not aid and abet commission of the criminal acts. However, the law is clear in this jurisdiction that communication between an accused and the principal offender is not necessary to incur culpability as an aider and abettor. *Ladrey v. United States*, 81 U.S. App. D.C. 127, 155 F.2d 417 (1946), *cert. denied*, 329 U.S. 723. We suggest the evidence is overwhelming that appellants Calhoun and Fields, over and above their commission of the acts of carnal knowledge and sodomy as principals, acted in a manner to assist each other and other unnamed parties in commission of these offenses sufficient to incur culpability as aiders and abettors.

IV. Having failed to object to the trial court's instructions below, appellants are foreclosed from now challenging them absent a showing of plain error affecting substantial rights. The instructions appellants now deem objectionable are entirely proper and in no sense constitute plain error affecting appellants' substantial rights.

(Tr. III 152, 154, 156, 157, 159, 160, 161, 163, 166, 167)

Counsel for appellants, showing themselves to be advocates of some sophistication throughout the entire course of this four-day trial, interposed no objection to the trial court's instructions. Having accepted the instructions at trial, appellants are now ordinarily foreclosed from attacking these same instructions on appeal. Fed. R. Crim. P. 30. *Kelley v. United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Rivera v. United States*, 124 U.S. App. D.C. 99, 361 F.2d 553, cert. denied, 385 U.S. 938 (1966); *Williams v. United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, cert. denied, 375 U.S. 898 (1963); *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). This foreclosure is particularly appropriate in the present case where appellants' current objections depend on a series of subtle nuances of language not easily revealed by the cold record.

The general thrust of appellants' contentions is that confusion resulted from the trial court's failure to present the applicable rules of law to each defendant separately. It is well settled, however, that the trial court has broad discretion in instructing the jury. *Shettel v. United States*, *supra*; *Harriss v. United States*, *supra*; *Meisch v. United States*, *supra*. The circumstances of this case—the single criminal enterprise, both appellants' guilt resting largely on the same evidence and the similar character of the defenses they offered—surely serve as an ample justification to present the applicable rules of law to the jury as to both jointly. Moreover, appellants fail to mention the following admonition of the trial court to the jury to consider the charges against each appellant separately:

"Now ladies and gentlemen of the jury, we have in this particular case multiple defendants, that is, two defendants. Now each defendant is entitled to a separate and distinct consideration. In other words, both defendants, or you are trying as it were two cases at one time. Both defendants are entitled to your candid, impartial consideration of their particular position; that is, both on rape and on the aiding and abetting on the sodomy. Both are entitled to your separate consideration". (Tr. III 152).

Finally, at many points throughout the instruction the trial court spoke separately about each appellant and the prerequisite findings necessary to finding his guilt (Tr. III 154, 161, 163, 167).

Appellants are hard pressed to show any confusion resulting from the form of the trial court's instruction. Paying but lip service to the long settled axiom that the jury charge must be considered as a whole [*Askins v. United States*, 97 U.S. App. D.C. 407, 231 F.2d 741, *cert. denied*, 351 U.S. 989 (1956); *Kinard v. United States*, 69 App. D.C. 322, 101 F.2d 246 (1948)], appellants instead engage in a kind of picayune sophistry supported by phrases and sentences out of context to make their point. Thus, they indicate their objection to the trial court's statement that it would not read the fourth count of the indictment because "it is the same as the third" (Tr. III 154) on grounds that it was not the same as the third (App. Br. 20). It is clear, however, that the court meant that the fourth count contained the same offense but with the names of the participants reversed. Moreover, the court had just stated to the jury it would provide them with copies of the indictment when they returned to the jury room and in fact did so. Finally, the trial court read the substance of count four somewhat later in its charge (Tr. III 162). Appellants object to the statement of the trial court that in determining the existence of carnal knowledge their attention "must be directed to this single question" of whether sexual intercourse with the victim occurred and was against her will. They suggest that it excludes from the jury's consideration their participation

in it (App. Br. 21). Several times, however, the trial court plainly indicated to the jury that it must be convinced beyond a reasonable doubt that appellants were the perpetrators of the crimes to find them guilty (Tr. III 159, 160).

Appellants' objections to the trial court's instructions on consent are a compendium of misinformation. Appellant Fields testified that the prosecutrix submitted voluntarily to intercourse with the individual called "John"—whom Mrs. Ward identified as appellant Calhoun. Hence, appellants' present claim that consent as to appellant Calhoun was not a part of the case is incorrect. Further, in view of the fact that appellants now vigorously contest the *corpus delecti* of the sodomy, we find inconsistent their statement that "obviously her torn clothing and naked condition, coupled with hysteria could lead to no other conclusion" then that she was attacked (App. Br. at 21). Appellants' inference that this issue was so obviously resolved against them that the trial judge should have withdrawn it from the jury's consideration is absurd.

In cataloguing the factors bearing on consent, the trial judge mentioned the "presense or absence" of deadly weapons as meriting consideration (Tr. III 159). We are unable to understand appellants' objection to this phrase. Surely there was evidentiary support that neither appellant during the attacks had brandished a deadly weapon sufficient to bring that fact within the trial court's disjunctive. Appellants' objection to the court's use of the term "defendant" in the singular (Tr. III 159) is so frivolous as not to merit a reply.

We think there is no merit to appellants' objection to the form of the trial court's instruction on sodomy that it lacked the necessity of corroboration (Tr. III 162, 163). The court was careful to instruct the jury that the offense had to be proved beyond a reasonable doubt. Its prior discussion of corroboration with regard to carnal knowledge (Tr. III 156, 157) was sufficiently general to guide the jury with regard to the offense of sodomy. Moreover, if there be error in the instruction on sodomy by

failure to include the element of corroboration, we think it harmless. Since appellants were found guilty of carnal knowledge, the jury found sufficient corroboration of both the *corpus delecti* of the rape and appellants' identity as the attackers. Such corroborative circumstances as would sustain the carnal knowledge convictions would largely support the convictions for sodomy. Thus, we do not think appellants can claim from the court's instruction on sodomy that plain error affecting substantial rights occurred.

Appellants' objections to the trial court's instructions on reasonable doubt (App. Br. 22-23) are frivolous. In no way was the jury ever left with the impression that any of its findings could be made on a standard other than 'without reasonable doubt'. Time and again at the close of its instructions the court indicated to the jury that the burden was on the Government to prove "beyond a reasonable doubt not only that the crime alleged was committed" but also "that the defendant was the one who committed the crime" (Tr. III 166). It admonished the jury, "you must be satisfied beyond a reasonable doubt of the identity of the defendant[s] as the person[s] who committed the crime in question." (Tr. III 166). It indicated that it was not necessary for the defendant to prove that another person committed the acts in question or to prove his innocence. Rather, it stated "if facts and circumstances have been introduced into evidence which raises a reasonable doubt as to whether or not the defendant was the person who committed the offense charged, then you should find the defendant or the defendants not guilty" (Tr. III 167).

"Few words possess the precision of mathematical symbols."⁴⁴ Notwithstanding appellants' attempt to magnify to prejudicial dimension isolated ambiguities in the instructions below, considered as a whole those instruc-

⁴⁴ *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 440 (1952).

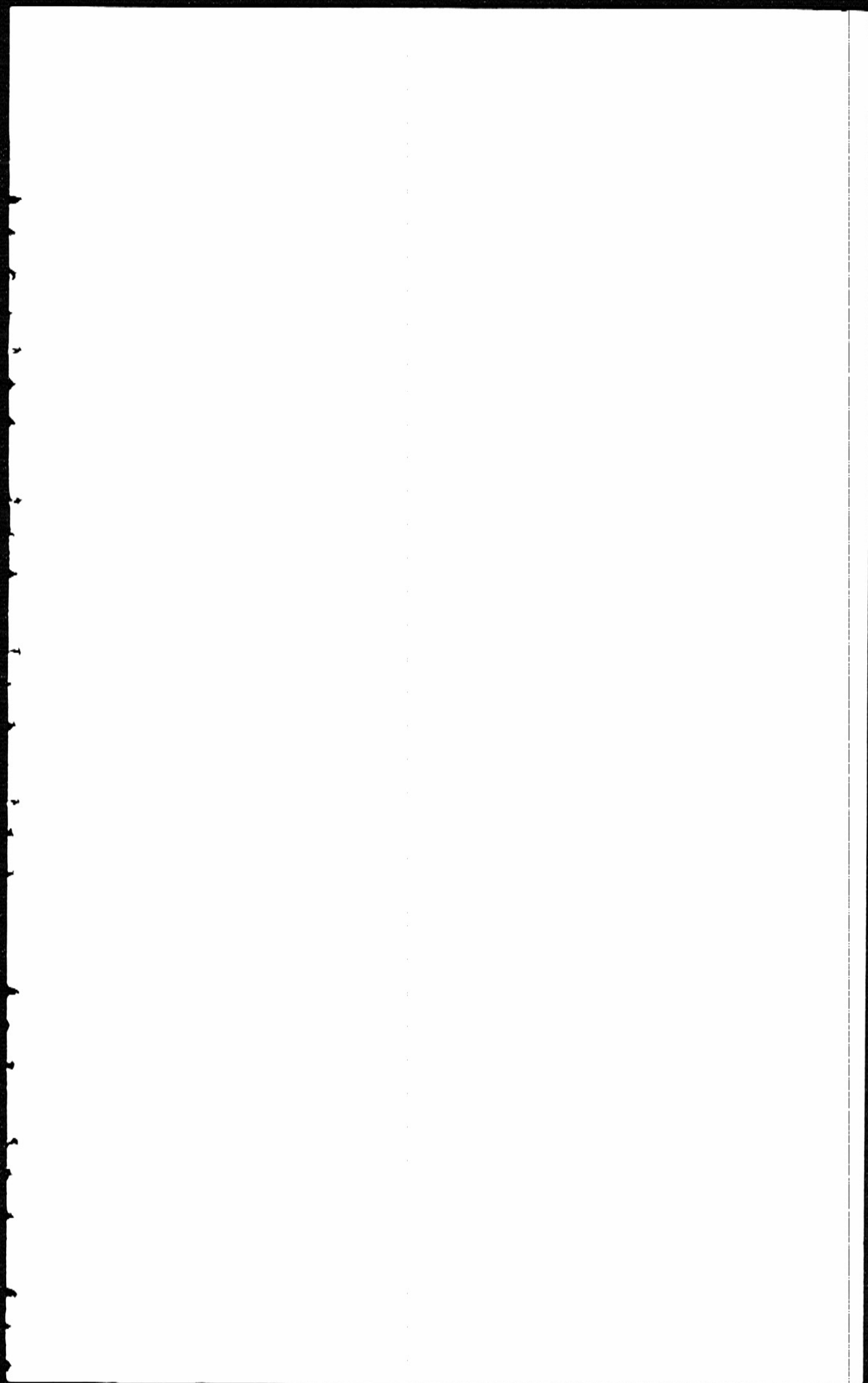
tions properly apprised the jury of the applicable law in the case. Appellants by these instructions in no sense suffered plain error affecting substantial rights.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FILED AUG 20 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT CALHOUN, JR.
CALVIN FIELDS -

Appellants,

v.

UNITED STATES OF AMERICA

Appellee.

No. 21,119
21,120

PETITION FOR REHEARING

Come now appellants, by their attorney, Bernard I. Nordlinger, appointed by the Court, and move that a rehearing be granted under Federal Rule of Appellate Procedure 40 on the following grounds:

1. The decision of August 9, 1968, in affirming appellants' conviction fails to dispose of one of appellants' principal allegations of error: "the missing witness" rule mentioned by the trial court in its instructions to the jury, and the prosecution's use of the same rule twice in argument.

2. The alleged error is believed to compel the award of a new trial. See, Joint Brief for Appellants, 8, 9, 11, 14, and 15. As previously stated, "it cannot be said that the argument and the instruction of the Court constituted harmless error. This alone should justify reversal . . . "

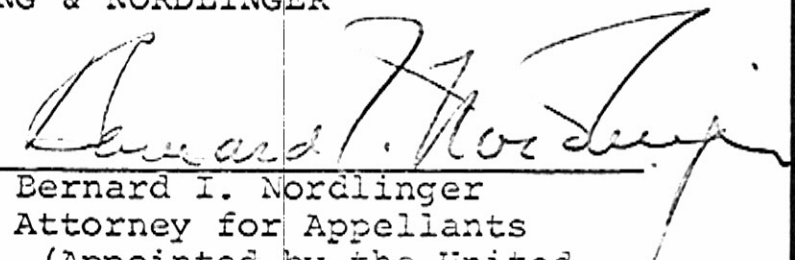
3. Although the opinion of this Court of August 9, 1968, takes note of the alleged error, the Court failed to render a decision thereon.

Accordingly, it is respectfully requested that a rehearing be granted for the purpose of giving consideration to the foregoing so that a new trial may be granted.

Respectfully submitted,

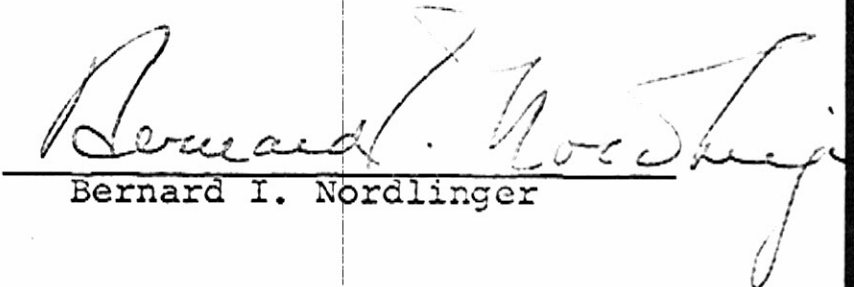
KING & NORDLINGER

By


Bernard I. Nordlinger
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(Appointed by the United
States Court of Appeals for
the District of Columbia
Circuit)
419 Southern Building
Washington, D. C. 20005

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Rehearing were delivered to the United States Attorney, United States Court House, Washington, D. C. this 20th day of August, 1968.


Bernard I. Nordlinger